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In The

Supreme Court of the United States

October Term, 1994

HOBART C. BISHOP, NANCY CONTARDI, MARTIN L. KELLEY, J. E. LALMAN, THOMAS LOVINGGOOD, TERRY MORRIS, DIANE MORRIS, RICHARD MURPHY, HORACE RENSHAW, WENDELL SMITH, and ALBERT M. TIACHE, individually and as class representatives of all others similarly situated,

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, GUY L. CARLTON, as Tax Collector of Collier County, RICHARD S. SHANAHAN, MICHAEL J. VOLPE, PATRICIA ANNE GOODNIGHT, BURT L. SAUNDERS, and MAX A. HASSE, as Commissioners of Collier County, and MARY MORGAN, as Supervisor of Elections of Collier County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

December 30, 1994

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QUESTION PRESENTED FOR REVIEW

When a municipality collects a tax without authority, may a state legislature, consistent with due process of law, respond to a timely refund action simply by passing a law that the revenues of the illegal levy need not be refunded?

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

OPINIONS BELOW

The decision of the Supreme Court of Florida, dated October 5, 1994, denying the petitioners' request for that court to accept jurisdiction of an appeal from the District Court of Appeal for the Second District, State of Florida, is not reported. A copy is reproduced at Appendix A-1 (hereinafter "A-").

The opinion of the District Court of Appeal for the Second District, State of Florida (reproduced at Appendix A-3), issued

on April 15, 1994, is reported at 635 So. 2d 145 (Fla. 2d DCA 1994).

The January 28, 1993 Summary Final Judgment of the Circuit Court for Collier County, State of Florida, and the Amended Final Summary Judgment of that court, dated December 28, 1993, from which an appeal was taken to the District Court of Appeal, are not reported. They are reproduced at Appendix A-7.

Earlier decisions of the District Court of Appeal for the Second District in this action are reported at 573 So. 2d 1054 (Fla. 2d DCA 1991) (A-13), and 588 So. 2d 291 (Fla. 2d DCA 1991) (A-15).

JURISDICTION

The judgment of the District Court of Appeal was dated and entered on April 15, 1994. Thereafter, the petitioners duly requested that the Supreme Court of Florida grant jurisdiction of an appeal from the decision of the District Court of Appeal. On October 5, 1994, Florida's highest court issued an order denying the petition. A-1.

Jurisdiction to review the decision of the District Court of Appeal is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

This petition, which challenges retroactive taxation by the Florida legislature, invokes the due process clause of the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. AMEND. XIV.

This petition involves the constitutionality of an April, 1992 amendment (see A-22) to the Local Option Tourist Development Act, F.S. § 125.0104 (A-23), which gave retroactive effect to Ordinance 90-43 of Collier County, Florida. The provisions of the Florida statute and the amendment are lengthy, and their pertinent text is set forth in full in the Appendix. A-22, A-23.

STATEMENT OF THE CASE

Introduction

In this case, the Florida legislature has presumed to overstep the boundaries of permissible retroactive taxation delineated in the due process decisions of this Court. The decision of the Florida court below represents a spreading conflict among state courts over the circumstances under which retroactive tax legislation can pass constitutional muster as "curative" legislation.

In 1990, without authority, Collier County, Florida began to collect a new tax on transient lodging. In late 1991, the Florida courts declared the tax to be unauthorized and invalid. Then, in early 1992, after victims of the unauthorized tax had begun lawsuits for refunds, the Florida legislature responded to the suits by quickly passing a law that specifically authorized Collier County to keep the revenues of the tax, which had been escrowed. It was the legislature's intention to extinguish the claims of the petitioners in mid-suit.

A Florida appellate court has now sustained this legislation. Its decision rests on the proposition that a legislature is always free to authorize the collection of a tax retroactively if it had the authority to enact it in the first place.

This sweeping holding is an affront to constitutional due process and stands as a dangerous precedent. It would leave no limits whatsoever on retroactive legislative approval of illegal tax levies. Moreover, it encourages local officials to levy taxes without regard to their taxing authority, knowing that once significant revenues are collected, political pressure may induce state lawmakers to approve the levy retroactively.

The petitioners respectfully ask this Court to confirm that its holdings in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922), and *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931), continue to restrain legislatures from destroying vested claims for recovery of unauthorized taxes.

How the Case Arose

In 1987 the Florida legislature passed a law setting forth certain conditions under which county legislatures could levy taxes on transient lodging. Local Option Tourist Development Act, F.S. § 125.0104 (A-23). Chief among these conditions was that a local "tourist development council" should have prepared and submitted a tourist development plan setting forth projected revenues and how revenues would be spent. F.S. § 125.0104(4)(c) (A-31).

In Collier County, however, the duly appointed tourist development council refused to submit a tourist development

plan. Exercising its statutory prerogative,[1] the council concluded that a tourist development tax was inadvisable and so informed the Collier County Board of Commissioners. *See Freni v. Collier County*, 588 So. 2d 291, 292 (Fla. 2d DCA 1991) (A-15).

Nevertheless, enticed by the revenues a tourist tax would provide, the Board of Commissioners decided to ignore the statutory prerequisites and sallied forth without a plan. In May, 1990 the Board of Commissioners imposed a tourist tax by enacting Collier County Ordinance 90-43. In September, 1990, the County submitted the tax to a voter referendum. The County then began collecting the tax.

Months before the County began collecting the tourist tax, and even before it was submitted to referendum, several hotel operators filed suit seeking injunctive relief and a declaration that the tax was unauthorized and invalid in the absence of a plan from the tourist development council. This litigation resulted in a October, 1991 ruling by the Florida District Court of Appeal for the Second Circuit

-- that the submission of a plan for a tourist development tax was a "mandatory condition precedent" to the valid enactment of a tax,

---

[1]The tourist development council had no obligation to recommend a plan for a tourist tax at all. As the Florida appellate court held,

> the legislature perceived the need to allow a cross-section of citizens of the county, including those affected in the accommodations industry, to assist in determining whether a tourist development tax should be considered by the county and, if so, to assist the county by recommending the specifics involved.

Id. at 294.

-- that Collier County had no authority to enact a transient lodging tax without a plan, and

-- that, therefore, the levy was illegal and its collection should be enjoined.

Freni v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991) (A-15 to A-21.)

By this time, about a year's worth of taxes had been collected. They were not, however, spent. Since *Freni* the funds have been voluntarily escrowed by Collier County and held in an interest-bearing account.

In March, 1992, the petitioners filed the refund class actions that are now before this Court. At the behest of Collier County, however, the Florida legislature, in response, hastily passed special legislation (the "Special Legislation") in April, 1992 that authorized Collier County to keep and spend the illegally collected tax revenues. Laws of Florida, ch. 92-204 (April 10, 1992) (see A-22).

The Special Legislation applied to "any county" whose governing body had levied a tourist development tax that had been invalidated because of the failure of a tourist development council to submit a tourist development plan. F.S. § 125.0104(2) (Supp.) (A-22). (As the Florida legislature recognized, Collier County was the only such county. A-52.) It provided that if the county reenacted the tax, and if the tax was approved by county voters in a referendum, the county could spend the illegally collected taxes. The legislative history of the Special Legislation indicates unambiguously that it was proposed in response to the *Freni* decision in order to frustrate the claims asserted in the present lawsuit. A-42; A-45 to A-47; A-49; A-52 to A-53; A-57 to A-60.

Accordingly, the petitioners amended their Complaint to seek, in addition to the original relief, a declaration that the April 10, 1992 Special Legislation was unconstitutional. On August 18, 1992 the Collier County Board of Commissioners availed itself of the Special Legislation and levied another, identical tax, which was approved in a November 3, 1992 referendum.

Decisions of the Florida courts

On a motion by the petitioners, the Florida Circuit Court for Collier County determined that the Special Legislation was unconstitutional and on January 28, 1993, granted them summary judgment on their claims for refunds. A-7.

On appeal, however, the Florida District Court of Appeal for the Second Circuit, which had invalidated the levy in the first place, reversed. In its April 15, 1994 decision, the District Court of Appeal held that the Florida legislature was entitled to "ratify" Collier County's unauthorized tax levy retroactively. A-3.

The petitioners thereafter sought permission to appeal to the Florida Supreme Court, but on October 5, 1994 that court issued an order in which it declined to hear an appeal. A-1.

WHY THE PETITION SHOULD BE GRANTED

When a municipality collects a tax without authority, may a state legislature respond to a timely refund action simply by passing a law that the revenues of the illegal levy need not be refunded? The present petition involves exactly such a case. The petition should be granted so that the Court can clarify the constitutional limits of so-called "curative" tax legislation and the rights of taxpayers with vested claims for refunds.

A. The decision of the Florida court is inconsistent with the decisions of this Court regarding "curative" tax legislation

Seventy-five years ago, in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 338, 66 L. Ed. 647, 648 (1922), this Court held that it was unconstitutional for the Florida legislature to ratify the prior, unauthorized collection of canal tolls from the plaintiffs. It was tantamount, as Justice Holmes wrote, to taxing persons in 1919 for passing through the lock of a canal in 1917. *Id.* at 339, 66 L. Ed. at 649.

In the present case, however, the Florida court has held that this same Florida legislature could ratify the unauthorized collection of a lodging tax from the petitioners in the present case. In its opinion, the Florida court referred to the April 10, 1992 Special Legislation as "a curative act" (A-5), as if it somehow "cured" a mistake by the District Court of Appeal in the 1991 *Freni* decision or by the Board of Commissioners, or rectified an unsuspected flaw in the original legislation.

In labeling the Special Legislation "curative", the Florida court aimed at bringing the case under this Court's holdings that in cases of administrative error, or where legislation is found to contain unintended defects, the mistake or defect can be cured by later legislation that has retroactive effect. *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (literal language of a law creating an estate tax deduction had unexpectedly broad application unintended by Congress); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 3 L. Ed. 2d 132 (1958) (curative legislation merely implemented what Congress had intended in the first place); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 378, 84 L. Ed. 814, 817 (1940) (defect by federal agency in administration in the handling of a

compensable claim could be corrected by private act of Congress); *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931) (taxpayer's obligation became uncollectible due to inadvertent failure of IRS to serve notice and demand for payment); *Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472, 1477 (10th Cir. 1984) (possible defects in legislature's procedures for creating water conservancy districts were obviated by curative legislation which ensured that original legislative intent would not be frustrated). Legislation that is truly "curative" has survived due process scrutiny even where causes of action are destroyed. *Graham v. Goodcell*, 282 U.S. 409, 429, 75 L. Ed. 415, 440 (1931).

But legislation is not genuinely "curative" if it does not address some mistake or defect. As this Court observed in *Graham*,

> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute *aptly designed to remedy mistakes and defects in the administration of government* where the remedy can be applied without injustice.

Id. (emphasis supplied).

The sort of "curative" amendments that *can* survive constitutional scrutiny are, moreover, those which *buttress* the original legislative scheme and purpose, not alter or create exceptions to it. *See Springdale Convalescent Center v. Mathews*, 545 F.2d 943 (5th Cir. 1977) (quoting *Federal Housing Administration v. Darlington*, 358 U.S. 84, 91, 3 L. Ed. 2d 132,

138 (1958)); *State of Florida v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). This Court's recent decision in *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), was such a case. As the Court stated in *Carlton*, "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 129 L. Ed. 2d at 29. Thus, there was "little doubt that the 1987 amendment to § 2057 was adopted as a curative measure". *Id.* at 28.

The Special Legislation, by contrast, was not "curative" in any respect. It did not cure a drafting or printing error in the original enabling legislation. It did not cure a bureaucrat's error. Nor was it aimed at correcting some perceived judicial misconstruction or misinterpretation of the original legislation. Nor had the Collier County Board of Commissioners made a "mistake". On the contrary, frustrated by what it viewed as obstinacy on the part of the tourist development council, the Board of Commissioners had deliberately and knowingly ignored the limits of its authority.

What the Special Legislation did, therefore, was to pardon rogue legislation by the Collier County Board of Commissioners -- a tax ordinance that flew in the face of the Florida legislature's original legislative policy. In its 1987 legislation, the legislature had "perceived the need to allow a cross-section of citizens of the county, including those affected in the accommodations industry, to assist in determining whether a tourist development tax should be considered by the county and, if so, to assist the county by recommending the specifics involved". *Freni v. Collier County*, 588 So. 2d 291, 294 (Fla. 2d DCA 1991) (A-21). As a matter of policy, the Florida legislature never intended that Collier County or any other county should have authority to impose a tourist tax if the duly constituted tourist development council

deemed one inadvisable. *Id.* at 293-94 (A-21). The legislative scheme, instead, set up tourist development councils as buffers and brakes on local county governments that might too readily seize upon a new but perhaps undesirable revenue source.

No reason has ever been suggested why this policy was inappropriate for Collier County -- why Collier County, alone in all of Florida, should have been excused from obtaining a recommendation from its tourist development council. Far from buttressing or, at the very least, complementing the original legislative scheme, the 1992 Special Legislation represented a 180-degree reversal of legislative policy.

"Curative" legislation typically makes an adjustment or correction in prior legislation. *E.g.*, *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (curative legislation amending the statutory rules governing a certain estate tax deduction). In the present case, however, the Special Legislation was so far from being "curative" that it made no prospective changes in the statute at all. Counties are *still* required to obtain tourist development plans from tourist development councils before they may implement transient lodging taxes. The only change in the law was to state that even though Collier County had not complied with the law, it could keep the taxes it had illegally collected under its 1990 ordinance.

The Florida court characterized the absence of a recommendation from Collier County's tourist development council as a "procedural defect" (A-6) (*cf. Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 378, 84 L. Ed. 814, 817 (1940)). This characterization was supremely inaccurate, as the history of the tax shows. The absence of a recommendation from the Collier County tourist development council was no oversight (or "unanticipated procedural fluke", as characterized by the County below). On the contrary, the Board of Commissioners actually

sought such a recommendation, but were thwarted when the council refused. They continued on their course by submitting the tax to Collier County voters even after the hoteliers commenced a lawsuit pointing out the patent lack of authority for the tax.

The Board of Commissioners could not have "corrected" the deficiency if it had wanted to. It proceeded without a recommendation not because it made a "mistake", but because it deliberately decided to ignore its lack of authority.

In summary, there was no defect or mistake. The original enabling legislation expressed exactly what the legislature intended, and the Collier County Board of Commissioners understood it perfectly well. The Board simply decided to take the law into its own hands. The absence of any "curative" features to the Special Legislation purporting to "ratify" the Collier County ordinance robs it of any colorable claim to constitutionality.

B. State courts are divided on the issue of when "curative" legislation is and is not constitutionally permissible

The constitutionality of curative retroactive tax legislation that is not truly "curative" is a recurring issue on which state court decisions are divided.

One such decision is *State ex rel. Emmerik v. Janklow*, 304 N.W.2d 700 (1981), which involved a tax increase that South Dakota officials began to collect in 1969. In 1980 the increase was determined by the South Dakota Supreme Court to have been unauthorized by 1969 legislation, and in 1981 the South Dakota legislature authorized the increase retroactively (12 years!) to 1969, thereby frustrating a class action refund suit. The South

Dakota Supreme Court held that the 1981 legislation did not violate due process because it was a "curative" act. *Id.*

This Court dismissed an appeal from the state court decision (*Emmerik v. Janklow*, 454 U.S. 1131, 71 L. Ed. 2d 285 (1982)), but Justice White, joined by Justice Blackmun, argued in dissent that the issue should be resolved:

> The difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation is apparent from an examination of our cases.

71 L. Ed. 2d at 285. Justice White discussed this Court's decisions in *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907), in which genuinely curative legislation was sustained, and *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922), where legislation similar to that in the present case was struck down. Justice White commented:

> Heinszen and Forbes appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively. However, Heinszen and Forbes offer little guidance as to whether a retroactive tax increase constitutes a change in legislative policy.

71 L. Ed. 2d at 286. He noted that the South Dakota court's decision in *Emmerik* was in apparent conflict with a decision of the Maryland Court of Appeals (*Washington National Arena Limited Partnership v. Treasurer*, 287 Md. 38, 410 A.2d 1060 (1980), *cert. denied*, 449 U.S. 834, 66 L. Ed. 2d 40 (1980)), and concluded:

> Just as it is clear that "the principle of curative legislation could, if carried too far, encourage irresponsible official conduct," [citing Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216, 239 (1960)] it is also clear that it is this Court's duty to define the boundary between permissible and impermissible retroactive tax increases.

71 L. Ed. 2d at 286.

It is respectfully submitted that the decision of the Florida court below widens the split of authority on this significant issue of constitutional law, which should be resolved by this Court.

C. The Florida court's holding that a tax may be imposed retroactively whenever there was authority to approve it in the first place represents a dangerous precedent which the Court should repudiate

The District Court of Appeal upheld the Special Legislation on the ground that since the Florida legislature had the authority to authorize the tourist tax in the first instance, it was free to ratify the invalidated tax after the fact. 635 So. 23 145, 146 (Fla. 2d DCA 1994) (A-5).

Under the umbrella of this broad premise, *any* illegal tax levy could be authorized after the fact. It is surely difficult to imagine an instance where it could not. The taxing powers of the United States Congress are so comprehensive that the Internal Revenue Service could, hypothetically, begin collecting taxes on almost anything, trusting in Congress to later confer retroactive taxing authority so as avoid refunds. The taxing powers of state legislatures are similarly broad.

The holding of the District Court of Appeal is particularly disturbing because it purports to rely on this Court's 88-year old decision in *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907). *Heinszen* represents, at most, the proposition that retroactive tax legislation is permissible to cure mistakes and irregularities. *Emmerik v. Janklow*, 454 U.S. 1131, 71 L. Ed. 2d 285 (1982) (White, J., dissenting from dismissal of appeal). *Heinszen* was given a narrow construction by this Court in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922). Later, in *Graham v. Goodcell*, 282 U.S. 409, 429, 75 L. Ed. 415, 440 (1931), this Court continued to limit and distinguish *Heinszen*, going so far as to say that in *Heinszen* "the principle of ratification was not necessarily involved" at all. *Id.* In short, *Heinszen* has little, if any, precedential value for this case.

The holding of the District Court of Appeal is also troubling, however, because of the way it distorts the principles that emerge from *Heinszen* and *Forbes*. Citing *Heinszen*, the court stated: "Where the authority exists in the first instance to confer the taxing power, the tax thereafter imposed is not void." 635 So. 23 145, 146 (Fla. 2d DCA 1994) (A-5).

The court overlooked the logical consequence of its premise, which was that since Collier County did *not* have authority to enact a tourist tax, as it had held in *Freni*, the tax it imposed *was* void and could *not* be ratified. Instead, the court went on to assert that since the Florida *legislature* had the authority in the first instance to impose tourist taxes, the tax illegally enacted by the *County* could be ratified by the legislature. This, it is respectfully submitted, is exactly the opposite of what this Court said in its earlier decisions. In *Forbes*, the Court explained *Heinszen* as follows:

> The argument that prevailed below was based on the supposed analogy of United States v. Heinszen . . . , which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power. [Citations omitted.] But generally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act.

Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 U.S. 338, 339, 66 L. Ed. 647, 648 (1922).

The reasoning of *Forbes* leads to only one conclusion. The Florida legislature could not constitutionally ratify the unauthorized 1990 levy of taxes because the legislature could not, in 1992, have constitutionally passed a retroactive tax on transactions that had already taken place in 1990.

The petitioners respectfully urge that the Court grant certiorari to clarify that *Heinszen* does not confer power on taxing authorities and legislatures, unconstrained by constitutional due process, to impose retroactive taxes in the guise of ratifying illegal and unauthorized tax levies.

D. The decision of the Florida court allows a legislature to extinguish rights to recover taxes levied without legislative authority in violation of due process of law

The decision of the Florida court below utterly ignores *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922),

and *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931), which petitioners had urged as controlling. Those decisions established that a taxpayer's right to a refund of an illegal and unauthorized tax levy cannot, consistent with due process, be extinguished by later legislation. Ironically, the only decision of this Court cited at all by the Florida court was *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907) -- which this Court distinguished and limited in *Forbes* and *Graham*.

The circumstances of *Forbes* are analogous in all respects to those in the present case. In 1917, the Everglades Drainage District Board of Commissioners imposed a toll on boats passing through a lock, including the plaintiff's. The Board of Commissioners argued at length (as did the County here in *Freni*) that it *did* have authority to impose a toll. The Florida courts determined, however, that the toll was unauthorized. "A careful examination of the acts of the Legislature does not reveal any express power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question." *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 77 Fla. 742, 82 So. 346, 351 (1919).[2]

The Florida Supreme Court's decision established Forbes Pioneer Boat Line's right to recover the illegally exacted canal lock tax, just as the *Freni* decision established the petitioners' right to recover illegally exacted tourist taxes. Both decisions turned on the conclusion that there was no legislative authority for the taxes in question. Moreover, the decision left the Boat

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[2]In the Florida court, the County attempted to distinguish *Forbes* as a case in which "a tax was levied without any enabling legislation whatsoever." But the decision of the Florida Supreme Court cited in the text above indicates that the legislature *had* conferred numerous powers on the district, from which the district was able to argue that the power to collect tolls was implied.

Line in exactly the same position as the petitioners in this action: with a judicial determination that a tax was unauthorized and a right of recovery that had not yet been reduced to a judgment.

What happened then in *Forbes* was echoed precisely by the events in 1992 after the *Freni* decision. Just as it responded to the Florida Supreme Court's decision in *Forbes* by passing legislation purporting to validate the collection of the canal lock tax (see *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 338, 66 L. Ed. 647, 648 (1922))[3] the Florida legislature responded to the Circuit Court's ruling in favor of the petitioners in *Freni* by enacting the legislation at issue on this appeal. As in the present case, the taxpayer was then compelled to litigate the validity of purported "curative" legislation.

In 1920 the Florida Supreme Court held (in its second decision in *Forbes*) that the legislative attempt to ratify the illegal collection of tolls was permissible.[4] On further appeal, however, this Court reversed and held that the Boat Line could not constitutionally be deprived of its right to recoup the unauthorized tolls. The nub of the issue was that the refund claim could not simply be abolished, any more than any other creditor's claim:

> Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is

---

[3]Indeed, the purported "curative" legislation was promptly passed on the same day that the Florida Supreme Court decision issued its decision. *Id.* at 338, 66 L. Ed. at 648.

[4]*Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 80 Fla. 252, 86 So. 199, 201 (1920).

> when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation.

258 U.S. at 340, 66 L. Ed. at 649. Persons who had patronized the lock before the toll was authorized could not be made liable for a toll after the fact -- not even through the device of "curative" or "ratifying" legislation:

> [G]enerally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. . . . If we apply that principle this statute is invalid. For if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

Id. at 339, 66 L. Ed. at 649.

The circumstances of *Forbes* are indistinguishable in every respect from those now before this Court: (1) a tax imposed without proper authority; (2) a lawsuit yielding a judicial determination that the tax was unauthorized; (3) commencement of a suit to recover the illegal tax; and (4) a legislative attempt to validate the collection of the tax retroactively. In 1919 it was too late for the legislature to impose a tax on the passage of a boat through a canal lock in 1917, consistently with constitutional due process. Similarly, in April, 1992 it was too late for the legislature to impose a tax on lodging transactions completed in 1990 and 1991.

Since *Forbes* and *Graham* were decided, the retroactive taxation cases that have come before this Court have typically involved retroactive changes in tax rates. These have been upheld on the ground that Congress traditionally and customarily makes changes to the tax laws retroactive for a limited period of time prior to the date of actual enactment, and that taxpayers have no vested rights in existing tax rates. *E.g.*, *United States v. Darusmont*, 449 U.S. 292, 66 L. Ed. 2d 513 (1981); *Welch v. Henry*, 305 U.S. 134, 83 L. Ed. 87 (1938); *Milliken v. United States*, 283 U.S. 15, 75 L. Ed. 809 (1931).

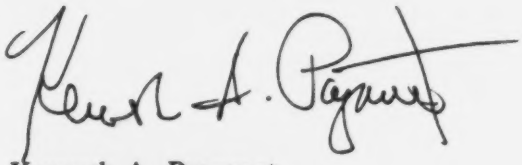
Nevertheless, as the Court noted in *United States v. Hemme*, 476 U.S. 558, 568, 90 L. Ed. 2d 538, 548 (1986), a "wholly new tax," as distinguished from changes to existing tax provisions, generally may not be imposed retroactively. *Accord*, *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22, 31 (1994) ("[I]t is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." *Id.* at 33 (O'Connor, J., concurring)). And as Justice Holmes observed in *Forbes*, the ratification of the collection of a tax that was illegal and unauthorized when it was collected is no different from the retroactive levy of a new tax.

The present case shows that the temptation for legislatures to simply retain revenues of illegal and unauthorized taxes is as great now as it was in 1920 when *Forbes* arose. The petitioners respectfully urge that the Court revisit *Forbes* and reaffirm its holding that new taxes may not be retroactively imposed, vested claims for refunds may not be extinguished, and unauthorized tax levies must be refunded.

CONCLUSION

For all the foregoing reasons, the petitioners respectfully urge that the petition for certiorari be granted and that the case be set down for argument.

December 30, 1994 Respectfully submitted,



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

HOBART C. BISHOP, NANCY CONTARDI, MARTIN L. KELLEY, J. E. LALMAN, THOMAS LOVINGGOOD, TERRY MORRIS, DIANE MORRIS, RICHARD MURPHY, HORACE RENSHAW, WENDELL SMITH, and ALBERT M. TIACHE, individually and as class representatives of all others similarly situated,

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, GUY L. CARLTON, as Tax Collector of Collier County, RICHARD S. SHANAHAN, MICHAEL J. VOLPE, PATRICIA ANNE GOODNIGHT, BURT L. SAUNDERS, and MAX A. HASSE, as Commissioners of Collier County, and MARY MORGAN, as Supervisor of Elections of Collier County,

Respondents.

APPENDIX

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SUPREME COURT OF FLORIDA

HOBART C. BISHOP, ET AL.,

PETITIONERS,

VS.

COLLIER COUNTY, FLORIDA, ET AL.

RESPONDENTS.

Wednesday, October 5, 1994

Case No. 83,745

District Court of Appeal
2nd District No. 93-00639

This cause having hereto been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

GRIMES, C.J., OVERTON, SHAW, KOGAN AND HARDING, JJ., CONCUR

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

BH
cc: Hon. William A. Haddad, Clerk
Hon. Dwight E. Brock, Clerk
Hon. Thomas S. Reese, Judge

Mr. Timothy R. Parry
Mr. Kenneth B. Cuyler
Ms. Sylvia B. Walbolt
Mr. Alan C. Sundberg
Mr. Gary L. Sasso
Mr. Michael R.N. McDonnell
Ms. Melissa A. Gay

COLLIER COUNTY

GUY L. CARLTON, AS TAX COLLECTOR OF COLLIER COUNTY, RICHARD S. SHANAHAN, MICHAEL J. VOLPE, PATRICIA ANN GOODNIGHT, BURT L. SAUNDERS AND MAX A. HASSEE, AS COMMISSIONERS OF COLLIER COUNTY AND MARY MORGAN, AS SUPERVISOR OF ELECTIONS OF COLLIER COUNTY,

APPELLANTS,

VS.

JOSEPH FRENI, JR., THE RITZ-CARLTON HOTEL, THE NAPLES GOLF AND BEACH CLUB, INC., VAN-DEV, INC., D/B/A VANDERBILT INN ON THE GOLF, MARRIOTT'S MARCO ISLAND RESORT, INC., LA PLAYA ASSOCIATES, INC., MARCO BAY RESORT, INC., DT HOTEL DEVELOPMENT CORPORATION, D/B/A EDGEWATER BEACH HOTEL, OLDE NAPLES LAND PARTNERS, LTD., D/B/A HOWARD JOHNSON'S LODGE, AND BOMARK, INC., D/B/A TRAILS END MOTEL AND RICHARD D. GRIFFITH, INDIVIDUALLY AND AS CLASS REPRESENTATIVE OF ALL OTHERS SIMILARLY SITUATED, HOBART C. BISHOP, NANCY CONTARDI, MARTIN L. KELLEY, J.E. LALMAN, THOMAS LOVINGGOOD, TERRY MORRIS, DIANE MORRIS, RICHARD MURPHY, HORACE RENSHAW, WENDELL SMITH AND ALBERT M. TIACHE, INDIVIDUALLY, AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

APPELLEES.

NO. 93-00639.

DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT.

APRIL 15, 1994

Taxpayers sought refunds of local taxes levied under invalidated ordinance permitting local tourist development tax. The Circuit Court, Collier County, Thomas S. Reese, J., awarded taxpayers refunds, and county officials appealed. The District Court of Appeal, Ryder J., held that where legislature had power in first instance to confer on counties power to impose and collect tourist tax, tax initially imposed by county was not void, although it was subject to invalidation for failure to follow procedural requirements of Local Option Tourist Development Act, and thus legislature acted within its capacity in ratifying tax by providing means to correct procedural defect of absence of plan for tourist development.

Kenneth B. Cuyler, County Atty., Naples and Gary L. Sasso and Sylvia H. Walbot, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for appellants.

Michael R.N. McDonnell, McDonnell Law Offices, Naples, for appellee Richard D. Griffith.

Timothy R. Parry, Harter, Secrest & Emery, Naples, for appellees Hobart C. Bishop, Nancy Contardi, Martin L. Kelley, J.E. Lalman, Thomas Lovinggood, Terry Morris, Diane Morris, Richard Murphy, Horace Renshaw, Wendell Smith and Albert M. Tiache.

RYDER, Judge.

Appellants challenge the final summary judgment awarding taxpayer refunds of local taxes levied under an invalidated ordinance. We reverse.

This is the third time this court has reviewed the proceedings in the circuit court regarding Collier's ordinance no. 90-43. See Freni v. Collier County, 573 So.2d 1054 (Fla. 2d DCA 1991) (Freni I); Freni v. Collier County, 588 So.2d 291

(Fla. 2d DCA 1991) (Freni II). The ordinance permitted a local tourist development tax authorized by the Local Option Tourist Development Act (the Act), section 125.0104, Florida Statutes (1987). The circuit court initially upheld the ordinance despite the absence of a plan for tourist development as required by section 125.0104(4), Florida Statutes (1987). This court held that the submission of a plan was a necessary condition precedent to the levy of the tax and reversed the circuit court. See Freni II.

Before Freni II issued and before the county began collecting the tax, various hotel operators filed a declaratory relief action seeking to bar the operation of the ordinance. After the issuance of Freni II, the taxpayers sued for refunds of the taxes collected prior to that decision. The circuit court consolidated the hotel operators' and taxpayers' cases.

While the consolidated case proceeded in the circuit court, the legislature passed a curative act. See § 125.0104, Fla.Stat. (1992 Supp.). The 1992 amendment ratified previously imposed taxes which were subject to invalidation for failure to follow certain requirements, including the requirement that the tourist development council submit a plan for tourist development. Subsequent to the amendment, a majority of the voters in the referendum held in Collier County approved another tourist tax. The tax was levied in accordance with the Act as amended. The circuit court, nevertheless, awarded the taxpayers refunds.

We find United States vs. Heinszen, 206 U.S. 370, 27 S.Ct. 742, 1 L.Ed. 1098 (1907), controlling. Where the authority exists in the first instance to confer the taxing power, the tax thereafter imposed is not void. See Heinszen. If the tax is not void, then the legislature may ratify the tax. See Heinszen.

The legislature had the authority in the first instance to confer on counties the power to impose and collect a tourist tax.

Given the initial valid exercise of the legislature's authority, the tax as initially imposed was not void, as was the tax in New Smyrna Inlet Dist. v. Esch, 103 Fla. 24, 137 So. 1, reh'g denied, 103 Fla. 24, 138 So. 49 (1931). Although the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development.

Accordingly, we reserve the circuit court's order awarding refunds to the taxpayers and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

FRANK, C.J., and BLUE., J., concur.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA - CIVIL ACTION

JOSEPH FRENI, JR., ET AL.,

PLAINTIFFS,

VS.

COLLIER COUNTY, FLORIDA, ET AL.,

DEFENDANTS.

CONSOLIDATED CASE NOS.
90-2182CA-01TSR
92-0419CA-01WLB
92-0791CA-01HDH

RICHARD D. GRIFFITH, ET AL.,

PLAINTIFFS,

VS.

GUY L. CARLTON,

DEFENDANTS.

HOBART C. BISHOP, ET AL.,

PLAINTIFFS,

VS.

RICHARD S. SHANAHAN, ET AL.,

DEFENDANTS.

SUMMARY FINAL JUDGMENT

THIS CAUSE having come on for hearing before the undersigned upon the Cross-Motions for Summary Judgment filed by the parties, and the Court having reviewed the memoranda submitted by counsel in support of their respective positions and having considered the arguments of counsel at the hearing, it is hereby

ORDERED:

1. The Motion for Summary Judgment of plaintiffs HOBART C. BISHOP, et al. and of RICHARD D. GRIFFITH, et al., be and the same is hereby GRANTED, and the Cross-Motion for Summary Judgment of the defendants, COLLIER COUNTY and RICHARD SHANAHAN, et al., be and the same is hereby DENIED.

2. The Court hereby reserves jurisdiction of this cause for the purpose of administering the distribution and refund of the tax proceeds which are the subject matter of this case to the members of the class certified herein and for the purpose of awarding plaintiffs' counsel reasonable attorneys' fees plus costs in connection with this action and to enter such other orders as may be deemed proper or necessary in order to effectuate this judgment.

DONE AND ORDERED this 28 day of January, 1993, in Chambers at Fort Myers, Florida.

s/Thomas S. Reese
Thomas S. Reese, Chief Judge

Copies to:
Gregory W. Hootman, Esq.
Timothy R. Parry, Esq.
Michael R.N. McDonnell, Esq.
Cathy Reiman, Esq.
Michael Provost, Esq.
Gerald S. Livingston, Esq.
Kenneth B. Cuyler, Esq.

IN THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY, FLORIDA

JOSEPH FRENI, JR., ET AL.,

PLAINTIFFS,

VS.

COLLIER COUNTY, FLORIDA, ET AL.,

DEFENDANTS.

CONSOLIDATED
CASE NOS.
90-2182CA-01TSR
92-0419CA-01WLB
92-0791CA-01HDH

RICHARD D. GRIFFITH, ET AL.,

PLAINTIFFS,

VS.

GUY L. CARLTON,

DEFENDANTS.

HOBART C. BISHOP, ET AL.,

PLAINTIFFS,

VS.

RICHARD S. SHANAHAN, ET AL.,

DEFENDANTS.

AMENDED FINAL SUMMARY JUDGMENT

THIS CAUSE having come on for hearing before the undersigned upon the Cross-Motions for Summary Judgment filed by the parties, and the Court having reviewed the memoranda submitted by counsel in support of their respective positions and having considered the arguments of counsel at the hearing, it is hereby

ORDERED:

The Motion for Summary Judgment of plaintiffs HOBART C. BISHOP, et al. and of RICHARD D. GRIFFITH, et al., be and the same is hereby GRANTED, and the Cross-Motion for Summary Judgment of the defendants, COLLIER COUNTY and RICHARD SHANAHAN, et al., be and the same is hereby DENIED.

The Court hereby enters judgment for plaintiffs on the issue of liability on the part of Collier County for the refund of the disputed taxes.

The Court hereby reserves jurisdiction of this cause for the purpose of administering the distribution and refund of the tax proceeds which are the subject matter of this case to the members of the class certified herein and for the purpose of awarding plaintiffs' counsel reasonable attorneys' fees plus costs in connection with this action and to enter such other orders as may be deemed proper or necessary in order to effectuate this judgment.

DONE AND ORDERED this 28th day of December, 1993, in Chambers at Fort Myers, Florida.

s/Thomas S. Reese
Thomas S. Reese, Chief Judge

Copies to:
Gregory W. Hootman, Esq.
Timothy R. Parry, Esq.
Michael R.N. McDonnell, Esq.
Cathy Reiman, Esq.
Michael Provost, Esq.
Gerald S. Livingston, Esq.
Kenneth B. Cuyler, Esq.

COLLIER COUNTY

JOSEPH FRENI, JR., THE RITZ-CARLTON HOTEL, THE NAPLES GOLF AND BEACH CLUB, INC., VAN-DEV, INC., D/B/A VANDERBILT INN ON THE GULF, MARRIOTT'S MARCO ISLAND RESORT, INC., LA PLAYA ASSOCIATES, INC., MARCO BAY RESORT, INC., DT HOTEL DEVELOPMENT CORPORATION, D/B/A EDGEWATER BEACH HOTEL, OLDE NAPLES LAND PARTNERS, LTD., D/B/A HOWARD JOHNSON'S LODGE, AND BOMARK, INC., D/B/A TRAILS END MOTEL,

APPELLANTS,

VS.

COLLIER COUNTY, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND MARY MORGAN, AS SUPERVISOR OF ELECTIONS OF COLLIER COUNTY, FLORIDA,

APPELLEES.

No. 90-02495.

District Court of Appeal of Florida, Second District.

Feb. 6, 1991.

Appeal from nonfinal order of the Circuit Court for Collier County; Thomas S. Reese, Judge.

J. Dudley Goodlette and Cathy S. Reiman of Cummings & Lockwood, Naples, for appellants.

Brenda C. Wilson of Collier County Atty's Office, Naples, for appellees.

SCHEB, Judge.

The appellants sought to enjoin a referendum scheduled to be held on the issue of whether the Board of County Commissioners of Collier County should levy a tourist development tax pursuant to county ordinance no. 90-43. They also sought a declaratory judgment regarding the validity of the ordinance. On July 30, 1990, the trial court denied the appellants' motion for a temporary injunction on the ground that they had not demonstrated "a clear and legal right, a likelihood of irreparable harm, a substantial likelihood of success on the merits, and considerations of the public interest." This appeal ensued pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B).

The referendum was held as scheduled on September 4, 1990, and resulted in a favorable vote. Therefore, the issue of whether the court erred in denying the motion for temporary injunction is moot.

The appellants raise other points concerning the legality of ordinance no. 90-43. These points have not, however, been ruled upon by the trial court, and hence, are not properly before us on this appeal from the court's nonfinal order denying the temporary injunction.

Accordingly, we affirm the order denying the temporary injunction as being moot. We remand for such further proceedings as may be appropriate in this action wherein the appellants sought a declaratory judgment and other relief.

SCHOONOVER, C.J., and HALL, J., concur.

COLLIER COUNTY

JOSEPH FRENI, JR., THE RITZ-CARLTON HOTEL, THE NAPLES GOLF AND BEACH CLUB, INC., MARRIOTT'S MARCO ISLAND RESORT, INC., LA PLAYA ASSOCIATES, INC., MARCO BAY RESORT, INC., DT HOTEL DEVELOPMENT CORPORATION, D/B/A EDGEWATER BEACH HOTEL, OLDE NAPLES LAND PARTNERS, LTD., D/B/A HOWARD JOHNSON'S LODGE, AND BOMARK, INC., D/B/A TRAILS END MOTEL,

APPELLANTS,

VS.

COLLIER COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND MARY MORGAN, AS SUPERVISOR OF ELECTIONS OF COLLIER COUNTY, FLORIDA,

APPELLEES.

No. 90-03689.

District Court of Appeal of Florida,
Second District.

Oct. 30, 1991.

Rehearing Denied Nov. 21, 1991.

Hoteliers who were required to collect county-imposed tourist development tax appealed final judgment of the Circuit Court, Collier County, Thomas S. Reese, J., denying their request for declaratory and permanent injunctive relief. The District Court of Appeal, Scheb, Acting C.J., held that: (1)

hoteliers had standing to challenge tax, and (2) proposed tax was invalid, as county failed to comply with statutory condition precedent relating to tourist development council's preparation and submission of plan.

Reversed.

Cathy S. Reiman and J. Dudley Goodlette of Cummings & Lockwood, Naples, for appellants.

Brenda Coker Wilson, Collier County Attorney's Office, Naples, for appellee Collier County.

No appearance for appellee Mary Morgan.

Gerald S. Livingston of Kreuter & Livingston, P.A., Orlando, for amicus curiae Florida Hotel & Motel Ass'n., Inc.

SCHEB, Acting Chief Judge.

We agree with the appellants. The tourist development tax proposed by Collier County (County) and approved by a majority of its electors is invalid because the County failed to comply with the necessary statutory prerequisites.

In June 1988 the County, through its Board of County Commissioners, enacted Ordinance 88-58 which established the Collier County Tourist Development Council (TDC). The County designed this ordinance to comply with the requirements of section 125.0104, Florida Statutes (1987), Local Option Tourist Development Act, to enable the County to enact a tourist development tax. The ordinance contained a provision from the enabling act which required that the TDC "shall prepare and submit to the Board of County Commissioners for its approval a plan for tourist development." The ordinance required that the plan encompass the specifics enumerated in section 125.0104(4)(c).

Shortly thereafter, the County adopted a resolution establishing and appointing members to the TDC as required by its ordinance and section 125.0104(4)(e). The membership included Appellant Joseph Freni, Jr., and two other hoteliers, three county residents interested in tourism, a member of the Board of County Commissioners, and two representatives of municipalities within the county. After ten months of study, a plan for tourist development was proposed within the TDC. However, after several votes on whether to submit the plan, the TDC rejected the proposal.

After the TDC formally advised the County of its rejection on June 30, 1989, the County began to consider its own plan for tourist development. In May 1990 the County enacted Ordinance 90-43 based on its plan which varied from that considered by the TDC. The ordinance enacted a tourist development tax, subject to a referendum.

In response, the appellants filed suit on July 13, 1990, alleging the county ordinance authorizing the tax was enacted without a plan being first submitted by the TDC. The appellants sought to temporarily enjoin the scheduled referendum and requested the trial court to declare the ordinance invalid. The trial judge denied the appellants' request for a temporary injunction. And, since in the interim, on September 4, 1990, the voters approved the tax as proposed by the County, this court affirmed, on February 6, 1991, the trial court's denial of the temporary injunction.[1] Thereafter the trial court entered a final judgment denying the appellants' request for declaratory and permanent injunctive relief, holding: "The submission to the

---

[1] Freni v. Collier County, 573 So.2d 1054, 1055 (Fla. 2d DCA 1991) (issue of temporary injunction moot since referendum on ordinance had already been held).

Board of County Commissioners of a tourist development plan prepared and approved by the TDC is not a condition precedent to the submission of the tourist development tax question to referendum." This appeal ensued by a number of hoteliers who were required to collect the tax.

The appellants contend the trial court erred in upholding the County-imposed tax without requiring the TDC's prior preparation and submission of its tourist development plan to the County. We agree and reverse.

At the outset we reject the County's argument that the appellants do not have standing to challenge the tax because they have shown no special injury distinct from that suffered by other taxpayers in the district. The appellants meet the special injury standing requirement by virtue of their roles as collectors of a tax from their guests. *See McBride v. Overstreet,* 89 So.2d 672 (Fla.1956).

We now turn to the merits of this controversy. By enacting section 125.0104, the legislature enabled counties to levy a tax on transient rentals and to use the revenue derived therefrom for the promotion of tourism. The legislature stipulated, however, that before a county may impose any such tax, it must comply with the provisions of the statute and gain approval by a majority of the electors voting on the issue in a regular or special election.

§ 125.0104(4)(a), Fla.Stat. (1987). Accordingly, the Board of County Commissioners in enacting Ordinance 88-58 properly included the following mandate from section 125.0104(4)(c):

> Prior to enactment of an ordinance levying and imposing a tourist development tax, the Collier County Tourist Development Council shall prepare and submit to the board of county commissioners for its approval a plan for tourist development. The plan shall set forth the

> anticipated net tourist development tax revenue to be derived by the county for twenty-four (24) months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use as the same are authorized under section 125.0104(5), Florida Statutes. The plan shall include the approximate cost or expense allocation for each specific project or special use.

Thus, the legislature imposed a condition precedent requiring the TDC to prepare and submit a tourist development plan for approval before a county would be permitted to enact an ordinance levying the tax. In calling for a referendum on the issue of whether a tax was to be imposed, it is evident that the Board of County Commissioners had recognized this condition precedent, as seen in its proposed Ordinance 90-43 authorizing the tax:

> WHEREAS, said Collier County Tourist Development Council has presented to the Board of County Commissioners its plan regarding tourist development; and
>
> WHEREAS, the Board of County Commissioners then considered and modified the county plan for tourist development; ...

Although the trial court perceived the statutory requirement that the TDC submit a plan to the County, we agree with the appellants that it erred in concluding that the statutory language did not impose a mandatory condition precedent. The legislature may incorporate in a law a condition precedent upon which execution of the law may depend. *Taylor v. Tallahassee*, 130 Fla.418, 177 So.719 (1937); *Amara v. Town of Daytona Beach*

Shores, 181 So.2d 722 (Fla. 1st DCA 1966). The County, on the other hand, argues that requiring a plan from the TDC before it imposes a tax effectively grants the TDC power over enactment. This, it says, constitutes an unlawful delegation of authority. We disagree. In this case, the legislature merely required that before the County enacts an ordinance imposing a tourist development tax, it must consider a plan submitted by the TDC. We must assume the legislature properly expressed its intent in the plain language of the statute, as statutes are to be construed and applied in the form enacted. *Van Pelt v. Hilliard,* 75 Fla. 792, 78 So. 693 (1918).

In seeking to sustain its action and uphold the trial court's judgment, the County advances two alternative arguments. First, it classifies the TDC's rejection of a proposed tax as a plan in itself, explaining that it merely modified that rejection in formulating its own plan. We reject this proposition. This argument is based on an erroneous assumption which permitted the County to prepare its own plan under the guise of modifying the TDC's recommendation that no tax be levied. Section 125.0104(4)(c) is specific that the plan shall set forth:

> [T]he anticipated net tourist development tax revenue to be derived by the county for the 24 months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use....

TDC's rejection did not set forth any of the elements which encompasses a plan. Therefore, the TDC's communication to the County rejecting the tax did not constitute a submission of the required "plan." Further, the record does not reveal that upon

receipt of TDC's rejection that the County took any measures to compel submission of a plan by the TDC.

Next, the County urges the requirement of section 125.0104(4)(c) for submission of a plan for a tourist development tax is merely directory. Therefore, it contends such requirement is not a condition precedent to its enactment of an ordinance. We also reject this contention. In requiring submission of a plan, the statute speaks in mandatory language using the word "shall" and not "may." Moreover, if the legislature had intended to authorize a county to proceed without the input of the TDC, there would have been no need for it to have provided for the appointment of a TDC.

In sum, we think that in enacting the Local Option Tourist Development Act, the legislature perceived the need to allow a cross-section of citizens of the county, including those affected in the accommodations industry, to assist in determining whether a tourist development tax should be considered by the county and, if so, to assist the county by recommending the specifics involved. In view of this concern and the plain statutory requirements of section 125.0104, we conclude the trial court erred in denying the appellants' request for declaratory and injunctive relief.

Reversed.

LEHAN and ALTENBERND, JJ., concur.

Florida Laws 1992, c. 92-204, § 2, provides:

"The governing body of any county that levied a tourist development tax pursuant to s. 125.0104, Florida Statutes, before December 1, 1991, regardless of the effective date of the initial ordinance, which tax is invalidated or subject to invalidation for failure to follow the requirements of s. 125.0104(4), Florida Statutes, including, but not limited to, the failure of a tourist development council to submit a requisite spending plan for tourist development to the governing body of the county for approval before the ordinance levying the tax was adopted, and that subsequently levies another such tax pursuant to s. 125.0104, Florida Statutes, which tax is approved by a majority vote of the electors of the county voting in a referendum before July 1, 1993, shall use the proceeds of the invalidated tax for the purposes that are authorized in the new levy. If the subsequent tourist development tax is disapproved by a majority of the electors of the county voting in a referendum before July 1, 1993, the proceeds of the tourist development tax which was levied prior to December 1, 1991, and was invalidated or subject to invalidation as a result of a failure to follow the requirements of s. 125.0104(4), Florida Statutes, shall be used for any purpose which was authorized in the initial ordinance. Nothing in this section shall be construed to cure any failure to comply with s. 125.0104(6), Florida Statutes." Laws 1992, c. 92-175, § 2, contains essentially the same provisions.

125.0104. Tourist development tax; procedure for levying; authorized uses; referendum; enforcement

(1) Short title.--This section shall be known and may be cited as the "Local Option Tourist Development Act."

(2) Application.--The provisions contained in chapter 212 apply to the administration of any tax levied pursuant to this section.

(3) Taxable privileges; exemptions; levy; rate.--

(a) It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, or condominium for a term of 6 months or less is exercising a privilege which is subject to taxation under this section, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

(b) Subject to the provisions of this section, any county in this state may levy and impose a tourist development tax on the exercise within its boundaries of the taxable privilege described in paragraph (a), except that there shall be no additional levy under this section in any cities or towns presently imposing a municipal resort tax as authorized under chapter 67-930, Laws of Florida, and this section shall not in any way affect the powers and existence of any tourist development authority created pursuant to chapter 67-930, Laws of Florida. No county authorized to levy a convention development tax pursuant to s. 212.0305 or s. 212.057, or s. 8 of chapter 84-324, Laws of Florida, shall be allowed to levy more than the 2-percent tax

authorized by this section. A county may elect to levy and impose the tourist development tax in a subcounty special district of the county. However, if a county so elects to levy and impose the tax on a subcounty special district basis, the district shall embrace all or a significant contiguous portion of the county, and the county shall assist the Department of Revenue in identifying the rental units subject to tax in the district.

(c) The tourist development tax shall be levied, imposed, and set by the governing board of the county at a rate of 1 or 2 percent of each dollar and major fraction of each dollar of the total consideration charged for such lease or rental. When receipt of consideration is by way of property other than money, the tax shall be levied and imposed on the fair market value of such nonmonetary consideration.

(d) In addition to any 1-percent or 2-percent tax imposed under paragraph (c), the governing board of the county may levy, impose, and set an additional 1 percent of each dollar above the tax rate set under paragraph (c) by the extraordinary vote of the governing board for the purposes set forth in subsection (5) or by referendum approval by the registered electors within the county or subcounty special district. No county shall levy, impose, and set the tax authorized under this paragraph unless the county has imposed the 1-percent or 2-percent tax authorized under paragraph (c) for a minimum of 3 years prior to the effective date of the levy and imposition of the tax authorized by this paragraph. Revenues raised by the additional tax authorized under this paragraph shall not be used for debt service on or refinancing of existing facilities as specified in subparagraph (5)(a)1. unless approved by a resolution adopted by an extraordinary majority of the total membership of the governing board of the county. If the 1-percent or 2-percent tax authorized in paragraph (c) is levied within a subcounty special

taxing district, the additional tax authorized in this paragraph shall only be levied therein. The provisions of paragraphs (4)(a) through (d) shall not apply to the adoption of the additional tax authorized in this paragraph. The effective date of the levy and imposition of the tax authorized under this paragraph shall be the first day of the second month following approval of the ordinance by the governing board or the first day of any subsequent month as may be specified in the ordinance. A certified copy of such ordinance shall be furnished by the county to the Department of Revenue within 10 days after approval of such ordinance.

(e) The tourist development tax shall be in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease.

(f) The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.

(g) The person receiving the consideration for such rental or lease shall receive, account for, and remit the tax to the Department of Revenue at the time and in the manner provided for persons who collect and remit taxes under s. 212.03. The same duties and privileges imposed by chapter 212 upon dealers in tangible property, respecting the collection and remission of tax; the making of returns; the keeping of books, records, and accounts; and compliance with the rules of the Department of Revenue in the administration of that chapter shall apply to and be binding upon all persons who are subject to the provisions of this section. However, the Department of Revenue may authorize a quarterly return and payment when the tax remitted by the dealer for the preceding quarter did not exceed $25.

(h) The Department of Revenue shall keep records showing the amount of taxes collected, which records shall also include records disclosing the amount of taxes collected for and from each county in which the tax authorized by this section is applicable. These records shall be open for inspection during the regular office hours of the Department of Revenue, subject to the provisions of s. 213.053.

(i) Collections received by the Department of Revenue from the tax, less costs of administration of this section, shall be paid and returned monthly to the county which imposed the tax, for use by the county in accordance with the provisions of this section. They shall be placed in the county tourist development trust fund of the respective county, which shall be established by each county as a condition precedent to receipt of such funds.

(j) The Department of Revenue is authorized to employ persons and incur other expenses for which funds are appropriated by the Legislature.

(k) The Department of Revenue shall promulgate such rules and shall prescribe and publish such forms as may be necessary to effectuate the purposes of this section.

(l) In addition to any other tax which is imposed pursuant to this section, a county may impose up to an additional 1-percent tax on the exercise of the privilege described in paragraph (a) by majority vote of the governing board of the county in order to pay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a professional sports franchise facility. The provisions of paragraphs (4)(a) through (d) shall not apply to the adoption of the additional tax authorized in this paragraph.

(m) Any county which has imposed the additional 1-percent tax pursuant to paragraph (d) for a period of 1 year may, by a majority plus one vote of the governing board of the county, impose an additional tax of 2 percent of each dollar if the state is participating with the county in an economic development project for which the additional 2-percent tax is necessary to retire the bonded indebtedness, if the state's contribution toward the cost of the project does not exceed $3 million, and if the total cost of the project does not exceed $12 million. However, the additional tax imposed under this paragraph may not be levied in any portion of the county which is leased to another county. If the tax authorized in paragraph (c) or paragraph (d) is levied within a subcounty special taxing district, the additional tax authorized in this paragraph shall only be levied therein. The provisions of paragraphs (4)(a) through (d) shall not apply to the adoption of the additional tax authorized in this paragraph. The effective date of the levy and imposition of the tax authorized under this paragraph shall be the first day of the second month following approval of the ordinance by the governing board or the first day of any subsequent month as may be specified in the ordinance. A certified copy of such ordinance shall be furnished by the county to the Department of Revenue within 10 days after approval of such ordinance.

(n) 1. Any county, as defined in s. 125.11(1), which, on January 1, 1989, imposes a tourist development tax on leases and rentals, may impose an additional tax, by ordinance adopted by a majority vote of the governing body, at the rate of 2 percent on the sale of food, beverages, or alcoholic beverages in hotels and motels only, or in hotels, motels, and any establishment which is licensed under s. 565.02 except any establishment, other than a hotel or motel, licensed under s. 563.02 or s. 564.02. However, if on January 1, 1989, the

county is not administering the tourist development tax pursuant to subsection (10), the governing body of the county shall not adopt the ordinance authorized in this paragraph until January 1, 1990.

2. a. If the county imposes the tax authorized in this paragraph on sales of food, beverages, or alcoholic beverages in hotels and motels only, the proceeds of such tax shall be allocated by the county to a county-wide convention and visitors bureau which, by interlocal agreement and contract with the county, has been given the primary responsibility for promoting the county and its constituent cities as a destination site for conventions, trade shows, and pleasure travel, to be used for purposes provided in subparagraph (5)(a)2. or 3. In the event the county is not or is no longer a party to such an interlocal agreement and contract with a county-wide convention and visitors bureau, the county shall allocate the proceeds of such tax for the purposes described in subparagraph (5)(a)2. or 3.

b. If the county imposes the tax authorized in this paragraph on sales of food, beverages, or alcoholic beverages in hotels, motels, and any establishment which is licensed under s. 565.02, the proceeds from the tax shall be allocated as follows:

(I) For the first 2 years after the tax is imposed, 35 percent shall be used by the county to revitalize economically blighted areas, 20 percent shall be used by the county as provided by law, and 45 percent shall be allocated by the county to a county-wide convention and visitors bureau which, by interlocal agreement and contract with the county, has been given the primary responsibility for promoting the county and its constituent cities as a destination site for conventions, trade shows, and pleasure travel, to be used for purposes provided in subparagraph (5)(a)2. or 3. In the event the county is not or is

no longer a party to such an interlocal agreement and contract with a convention and visitors bureau, the county shall allocate the 45 percent of the proceeds for the purposes described in subparagraph (5)(a)2. or 3.

(II) Thereafter, an amount equal to the average of the proceeds collected from such tax during each of the first 2 years after the tax is imposed shall be allocated as provided in sub-sub-subparagraph (I) and any excess above such amount shall be allocated to the county to be used as provided by law.

3. The penalties provided in subsection (8) apply to the tax on the sale of food, beverages, or alcoholic beverages authorized in this paragraph.

(o) 1. In addition to any other tax which is imposed pursuant to this section, a high tourism impact county may impose an additional 1-percent tax on the exercise of the privilege described in paragraph (a) by extraordinary vote of the governing board of the county. The tax revenues received pursuant to this paragraph shall be used for one or more of the authorized uses pursuant to subsection (5).

2. A county is considered to be a high tourism impact county after the Department of Revenue has certified to such county that the sales subject to the tax levied pursuant to this section exceeded $600 million during the previous calendar year, except that no county authorized to levy a convention development tax pursuant to s. 212.0305 shall be considered a high tourism impact county. Once a county qualifies as a high tourism impact county, it shall retain this designation for the period the tax is levied pursuant to this paragraph.

3. The provisions of paragraphs (4)(a) through (d) shall not apply to the adoption of the additional tax authorized in

this paragraph. The effective date of the levy and imposition of the tax authorized under this paragraph shall be the first day of the second month following approval of the ordinance by the governing board or the first day of any subsequent month as may be specified in the ordinance. A certified copy of such ordinance shall be furnished by the county to the Department of Revenue within 10 days after approval of such ordinance.

(4) Ordinance levy tax; procedure.--

(a) The tourist development tax shall be levied and imposed pursuant to an ordinance containing the county tourist development plan prescribed under paragraph (c), enacted by the governing board of the county. The ordinance levying and imposing the tourist development tax shall not be effective unless the electors of the county or the electors in the subcounty special district in which the tax is to be levied approve the ordinance authorizing the levy and imposition of the tax, in accordance with subsection (6). The effective date of the levy and imposition of the tax shall be the first day of the second month following approval of the ordinance by referendum, as prescribed in subsection (6), or the first day of any subsequent month as may be specified in the ordinance. A certified copy of the ordinance shall be furnished by the county to the Department of Revenue within 10 days after approval of such ordinance. The governing authority of any county levying such tax shall notify the department, within 10 days after approval of the ordinance by referendum, of the time period during which the tax will be levied.

(b) At least 60 days prior to the enactment of the ordinance levying the tax, the governing board of the county shall adopt a resolution establishing and appointing the members of the county tourist development council, as prescribed in paragraph

(e), and indicating the intention of the county to consider the enactment of an ordinance levying and imposing the tourist development tax.

(c) Prior to enactment of the ordinance levying and imposing the tax, the county tourist development council shall prepare and submit to the governing board of the county for its approval a plan for tourist development. The plan shall set forth the anticipated net tourist development tax revenue to be derived by the county for the 24 months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use as the same are authorized under subsection (5). The plan shall include the approximate cost or expense allocation for each specific project or special use.

(d) The governing board of the county shall adopt the county plan for tourist development as part of the ordinance levying the tax. After enactment of the ordinance levying and imposing the tax, the plan of tourist development may not be substantially amended except by ordinance enacted by an affirmative vote of a majority plus one additional member of the governing board.

(e) The governing board of each county which levies and imposes a tourist development tax under this section shall appoint an advisory council to be known as the "...(name of county)...Tourist Development Council." The council shall be established by ordinance and composed of nine members who shall be appointed by the governing board. The chairman of the governing board of the county or any other member of the governing board as designated by the chairman shall serve on the council. Two members of the council shall be elected municipal

officials, one of whom shall be from the most populous municipality in the county or subcounty special taxing district in which the tax is levied. Three members of the council shall be owners or operators of motels, hotels, recreational vehicle parks, or other tourist accommodations in the county and subject to the tax. Three members of the council shall be persons who are involved in the tourist industry and who have demonstrated an interest in tourist development, but who are not owners or operators of motels, hotels, recreational vehicle parks, or other tourist accommodations in the county and subject to the tax. All members of the council shall be electors of the county. The governing board of the county shall have the option of designating the chairman of the council or allowing the council to elect a chairman. The chairman shall be appointed or elected annually and may be reelected or reappointed. The members of the council shall serve for staggered terms of 4 years. The terms of office of the original members shall be prescribed in the resolution required under paragraph (b). The council shall meet at least once each quarter and, from time to time, shall make recommendations to the county governing board for the effective operation of the special projects or for uses of the tourist development tax revenue and perform such other duties as may be prescribed by county ordinance or resolution. The council shall continuously review expenditures of revenues from the tourist development trust fund and shall receive, at least quarterly, expenditure reports from the county governing board or its designee. Expenditures which the council believes to be unauthorized shall be reported to the county governing board and the Department of Revenue. The governing board and the department shall review the findings of the council and take appropriate administrative or judicial action to ensure compliance with this section. The changes in the composition of the membership of the tourist development council mandated by

chapter 86-4, Laws of Florida, shall not cause the interruption of the current term of any person who is a member of a council on May 7, 1986.

(5) Authorized uses of revenue.--

(a) All tax revenues received pursuant to this section by a county imposing the tourist development tax shall be used by that county for the following purposes only:

1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, or auditoriums within the boundaries of the county or subcounty special taxing district in which the tax is levied. However, these purposes may be implemented through service contracts and leases with persons who maintain and operate adequate existing facilities;

2. To promote and advertise tourism in the State of Florida and nationally and internationally;

3. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county; or

4. To finance beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, clean-up, or restoration of inland lakes and rivers to which there is public access.

(b) Tax revenues received pursuant to this section by a county of less than 500,000 population imposing a tourist development tax may only be used by that county for the

following purposes in addition to those purposes allowed pursuant to s. 125.0104(5)(a): to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more museums, zoological parks, fishing piers or nature centers which are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public. All population figures relating to this subsection shall be based on the most recent population estimates prepared pursuant to the provisions of s. 186.901. These population estimates shall be those in effect on July 1 of each year.

(c) The revenues to be derived from the tourist development tax may be pledged to secure and liquidate revenue bonds issued by the county for the purposes set forth in subparagraphs (a)1. and (a)4. or for the purpose of refunding bonds previously issued for such purposes, or both; however, no more than 50 percent of the revenues from the tourist development tax may be pledged to secure and liquidate revenue bonds or revenue refunding bonds issued for the purposes set forth in subparagraph (a)4. Such revenue bonds and revenue refunding bonds may be authorized and issued in such principal amounts, with such interest rates and maturity dates, and subject to such other terms, conditions, and covenants as the governing board of the county shall provide. The Legislature intends that this paragraph shall be full and complete authority for accomplishing such purposes, but such authority shall be supplemental and additional to, and not in derogation of, any powers now existing or later conferred under law.

(6) Referendum.–

(a) No ordinance enacted by any county levying the tax authorized by paragraphs (3)(b) and (c) shall take effect until the ordinance levying and imposing the tax has been

approved in a referendum election by a majority of the electors voting in such election in the county or by a majority of the electors voting in the subcounty special tax district affected by the tax.

(b) The governing board of the county levying the tax shall arrange to place a question on the ballot at the next regular or special election to be held within the county, substantially as follows:

___ FOR the Tourist Development Tax

___ AGAINST the Tourist Development Tax.

(c) If a majority of the electors voting on the question approve the levy, the ordinance shall be deemed to be in effect.

(d) In any case where a referendum levying and imposing the tax has been approved pursuant to this section and 15 percent of the electors in the county or 15 percent of the electors in the subcounty special district in which the tax is levied file a petition with the board of county commissioners for a referendum to repeal the tax, the board of county commissioners shall cause an election to be held for the repeal of the tax which election shall be subject only to the outstanding bonds for which the tax has been pledged.

(7) Automatic expiration on retirement of bonds.--

Anything in this section to the contrary notwithstanding, if the plan for tourist development approved by the governing board of the county, as amended from time to time pursuant to paragraph (4)(d), includes the acquisition, construction, extension, enlargement, remodeling, repair, or improvement of a publicly owned and operated convention center, sports stadium,

sports arena, coliseum, or auditorium, the county ordinance levying and imposing the tax shall automatically expire upon the retirement of all bonds issued by the county for financing the same; however, nothing herein shall preclude that county from enacting an ordinance pursuant to the provisions of this section reimposing a tourist development tax, upon or following the expiration of the previous ordinance.

(8) Prohibited acts; enforcement; penalties.--

(a) Any person who is taxable hereunder who fails or refuses to charge and collect from the person paying any rental or lease the taxes herein provided, either by himself or through his agents or employees, is, in addition to being personally liable for the payment of the tax, guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082,

s. 775.083, or s. 775.084.[2]

(b) No person shall advertise or hold out to the public in any manner, directly or indirectly, that he will absorb all or any part of the tax, that he will relieve the person paying the rental of the payment of all or any part of the tax, or that the tax will not be added to the rental or lease consideration or, when added, that it or any part thereof will be refunded or refused, either directly or indirectly, by any method whatsoever. Any person who willfully violates any provision of this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.[2]

(c) The tax authorized to be levied by this section shall constitute a lien on the property of the lessee, customer, or tenant in the same manner as, and shall be collectible as are, liens authorized and imposed in ss. 713.67, 713.68, and 713.69.

(9) County tourism promotion agencies.--In addition to any other powers and duties provided for agencies created for the purpose of tourism promotion by a county levying the tourist development tax, such agencies are authorized and empowered to:

(a) Provide, arrange, and make expenditures for transportation, lodging, meals, and other reasonable and necessary items and services for such persons, as determined by the head of the agency, in connection with the performance of promotional and other duties of the agency. However, entertainment expenses shall be authorized only when meeting with travel writers, tour brokers, or other persons connected with the tourist industry. All travel and entertainment-related expenditures in excess of $10 made pursuant to this subsection shall be substantiated by paid bills therefore. Complete and detailed justification for all travel and entertainment-related expenditures made pursuant to this subsection shall be shown on the travel expense voucher or attached thereto. Transportation and other incidental expenses, other than those provided in s. 112.061, shall only be authorized for officers and employees of the agency, other authorized persons, travel writers, tour brokers, or other persons connected with the tourist industry when traveling pursuant to paragraph (c). All other transportation and incidental expenses pursuant to this subsection shall be as provided in s. 112.061. Operational or promotional advancements, as defined in s. 288.35(4), obtained pursuant to this subsection, shall not be commingled with any other funds.

(b) Pay by advancement or reimbursement, or a combination thereof, the costs of per diem and incidental expenses of officers and employees of the agency and other authorized persons, for foreign travel at the current rates as specified in the federal publication "Standardized Regulations (Government Civilians, Foreign Areas)." The provisions of this

paragraph shall apply for any officer or employee of the agency traveling in foreign countries for the purposes of promoting tourism and travel to the county, if such travel expenses are approved and certified by the agency head from whose funds the traveler is paid. As used in this paragraph, the term "authorized person" shall have the same meaning as provided in s. 112.061(2)(e). With the exception of provisions concerning rates of payment for per diem, the provisions of s. 112.061 are applicable to the travel described in this paragraph. As used in this paragraph, "foreign travel" means all travel outside the United States. Persons traveling in foreign countries pursuant to this subsection shall not be entitled to reimbursements or advancements pursuant to s. 112.061(6)(a)2.

(c) Payment by advancement or reimbursement, or by a combination thereof, the actual reasonable and necessary costs of travel, meals, lodging, and incidental expenses of officers and employees of the agency and other authorized persons when meeting with travel writers, tour brokers, or other persons connected with the tourist industry, and while attending or traveling in connection with travel or trade shows. With the exception of provisions concerning rates of payment, the provisions of s. 112.061 are applicable to the travel described in this paragraph.

(10) Local administration of tax.--

(a) A county levying a tax under the provisions of this section may be exempt from the requirements of this section that the tax collected be remitted to the Department of Revenue before being returned to the county, and that such tax be administered according to the provisions of part I of chapter 212, if the county adopts an ordinance providing for the collection and administration of the tax on a local basis.

(b) The ordinance shall include provision for, but need not be limited to:

1. Initial collection of the tax to be made in the same manner as the tax imposed under part I of chapter 212.

2. Designation of the local official to whom the tax shall be remitted, and that official's powers and duties with respect thereto. Tax revenues may be used only in accordance with the provisions of this section.

3. Requirements respecting the keeping of appropriate books, records, and accounts by those responsible for collecting and administering the tax.

4. Provision for payment of a dealer's credit as required under part I of chapter 212.

5. A portion of the tax collected may be retained by the county for costs of administration, but such portion shall not exceed 3 percent of collections.

(c) A county adopting an ordinance providing for the collection and administration of the tax on a local basis shall also adopt an ordinance electing either to assume all responsibility for auditing the records and accounts of dealers, and assessing, collecting, and enforcing payments of delinquent taxes, or to delegate such authority to the Department of Revenue. If the county elects to assume such responsibility, it may use any power granted in this section to the department to determine the amount of tax, penalties, and interest to be paid by each dealer and to enforce payment of such tax, penalties, and interest. If the county delegates such authority to the department, the department shall distribute any collections so received, less costs of administration, to the county. The amount deducted for costs of administration by the department shall be used only for those

costs which are solely and directly attributable to auditing, assessing, collecting, processing, and enforcing payments of delinquent taxes authorized in this section. If a county elects to delegate such authority to the department, the department shall audit only those businesses in the county that it audits pursuant to part I of chapter 212.

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FINANCE & TAXATION
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #:	CS/HB's 147, 1551, & 1967
RELATING TO:	Local Option Tourist Development Tax
SPONSOR(S):	Committee on Tourism, Hospitality and Economic Development, and Representatives Reddick, Foley, Bronson and Hawkins
STATUTE(S) AFFECTED:	s. 125.0104
COMPANION BILL(S):	SB 334 (S), SB 996 (S), SB 1784 (S), and SB 2178 (S)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) TOURISM, HOSPITALITY & ECONOMIC DEVELOPMENT YEA 16 NAY 1

(2) FINANCE AND TAXATION

(3) APPROPRIATIONS

(4)

****

I. SUMMARY:

Committee Substitute (CS) for House Bills 147, 1551, and 1967 enables any county (not just those with populations below 500,000) levying the tourist development tax pursuant to s. 125.0104, F.S., to use tax revenues for specified purposes related to the operations of museums open to the

public, that are either publicly owned or operated or owned and operated by not-for-profit organizations and open to the public. Additionally, the bill provides for the automatic expiration of the tourist development tax upon the retirement of bonds issued to finance such museums.

The bill provides for local option tourist development tax revenue use by a county which did not comply with conditions precedent to the levy of the tax authorized by s. 125.0104, F.S. A county government which had its tax levy invalidated may initiate another levy in accordance with general law and use the proceeds of the initial tax for the purposes authorized in the new levy.

The bill creates a joint study committee on tourist-related taxes and requires the committee to review specific issues related to tourist taxes. The committee is made up of 3 members of the Senate and 3 members of the House of Representatives. The committee is required to report its findings to the Legislature by January 1, 1993.

An additional provision of the bill authorizes county tourism promotion agencies to undertake marketing and advertising research and provide certain reservation and booking services. It also provides for the confidentiality of certain information given to or held by county tourism promotion agencies.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Currently, s. 212.03, F.S., imposes a 6 percent tax for transient rentals on persons who rent, lease, or let sleeping or housekeeping accommodations in a hotel, apartment house, roominghouse, or tourist or trailer

camp. The tax does not apply where there is a written lease in excess of 6 months or to a person who continuously resides for more than 6 months. Other exemptions exist for full-time students in postsecondary education and for military personnel.

Section 125.0104, F.S., is known as the Local Option Tourist Development Act. The taxable privilege described by legislative intent in subsection (3) relates to the renting, leasing or letting for consideration of "transient rentals". Transient rentals are described in this section as living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, or condominium for a term of 6 months or less. This act authorizes certain counties to levy a tourist development tax of 1 or 2% on transient rentals, in addition to the tax imposed on such rentals by Chapter 212. After 3 years of collecting the 1 or 2% tax, the governing board of the county (by extraordinary vote) may elect to impose an additional 1% tax on transient rentals.

Section 125.0104(5)(a), F.S., dictates that the revenues from these taxes may be used for four designated purposes.

- To acquire, construct, extend, enlarge, remodel, repair, improve, operate and promote one or more publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, or auditoriums within the county or subcounty special taxing district levying the tax and to secure or liquidate bonds for these purposes;

- To promote and advertise tourism in the state, nationally and internationally;
- To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county; or
- To finance beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access and to secure revenue bonds for these purposes.

Paragraph (c) of subsection (3) authorizes "high tourism impact" counties to levy an additional 1 percent tax (by extraordinary vote of the county's governing board) on transient rentals. A high tourism impact county is described by this paragraph to be one which the Department of Revenue certifies had transient rentals sales tax revenues in excess of $600 million during the previous calendar year or such revenues are at least 18 percent of the county's total sales tax revenues and the county's transient rentals sales tax revenues are at least $200 million. This paragraph also provides that the county may use the revenues from this 1 percent levy for those uses authorized in s. 125.0104(5), F.S.

Currently, there are 37 counties in Florida which have elected to levy local option tourist development taxes. Most of the revenues from this tax are spent by the counties on advertising and promotion and on convention centers. Several opportunities (tied to extenuating conditions) exist within s. 125.0104, F.S.,

for counties to levy additional taxes on transient rentals for other purposes such as:

- The payment of debt service on bonds issued to finance the construction, reconstruction, or renovation of a professional sports facility.
- To retire the bonded indebtedness of an economic development project co-sponsored by the county and the state.

Paragraph (b) of subsection (5), which provides that counties with less than 500,000 in population which are imposing a tourist development tax may use the revenues of that tax to acquire, construct, generally improve, or promote zoos, museums, fishing piers or nature centers. Those entities must be owned and operated publicly or by a not-for-profit corporation and open to the public.

Sixty days before a county can vote on the tourist development tax it must adopt a resolution establishing and appointing members to a county tourist development council (TDC). Paragraph (c) of subsection (4) s. 125.0104, F.S., requires such a TDC to prepare and submit a tourist development plan to be approved by the governing board, before the tax can be enacted. Paragraph (c) further stipulates that the plan must anticipate the net tourist development tax revenue to be derived by the county for 24 months following the levy of the tax, specify the tax district in which the tourist development tax is proposed, and provide a list, in priority order, of the specific, proposed uses of the tax revenues, with dollar amounts allocated for each use.

The Second District Court of Appeal invalidated a tourist development tax imposed by Collier County and approved by referendum on September 4, 1990, because the county failed to comply with the statutory prerequisites of s. 125.0104, F.S. Freni, et al. v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991). Although the county governing board did include in the ordinance levying the tax county tourist development plan elements required in paragraph (c) of subsection (4) of s. 125.0104, F.S., it did so without the required plan from the tourist development council.

Collier County also encountered problems with the language of the ordinance: the ordinance set the effective date of the ordinance as immediate upon filing with the Secretary of State's Office after approval by referendum. The provisions of s. 125.66, F.S., require a county to file any ordinance it has passed with the Secretary of State's Office within 10 days of the ordinance's passage. That section does authorize counties to prescribe later effective dates for the provisions of the ordinance. Collier County's governing board passed the ordinance May 29, 1990, filed the ordinance with the Secretary of State's Office June 6, 1990, and held the referendum election September 4, 1990. Consequently, the county reports that there has been some confusion regarding the actual effective date of the ordinance and the initial tax levy.

A second lawsuit has recently been filed seeking refunds on behalf of a class of taxpayers. Griffin v. Carlton, No. 92-0419(Fla. 20th Cir. comp. filed Feb. 5, 1992). The revenues of the local option tourist development tax collected in Collier County, prior to the invalidation of

the tax, amount to approximately $4.9 million. The county estimates it would cost approximately $500,000 to refund these tax revenues.

Subsection (9) of s. 125.0104, F.S., describes additional powers and duties of county tourism promotion agencies. Specifically, as they relate to the agency's tourism promotion activities, the agency is authorized in this subsection to pay for certain travel and entertainment expenses. In an effort to develop destination marketing strategies, local tourist development authorities conduct or commission advertising research. When such proprietary research data is subject to open records laws, the possibility exists for a compromise of the local government's competitive edge in tourism promotion.

B. EFFECT OF PROPOSED CHANGES:

The bill authorizes any county (not just those with a population under 500,000) levying the local option tourist development tax to utilize tax revenues for the purpose of financing museums which are open to the public and publicly owned and operated or owned and operated by not-for-profit corporations. In addition, it allows for the automatic expiration of the county ordinance levying the tourist development tax upon the retirement of all bonds issued to finance such museums.

County tourism promotion agencies are authorized by the bill to conduct marketing and advertising research projects, and to provide reservation services and convention booking services that are consistent with the authorized uses of tourism tax revenues outlined in s. 125.0104(5), F.S. By authorizing an exemption from

certain public records requirements, the bill provides for the confidentiality of certain individuals who provide data or other information provided a county tourism promotion agency in response to research projects or in the process of providing booking assistance. This enables the county tourism promotion agency to protect proprietary information from its competitors.

The bill provides that if a county government, which levied a local option tourist development tax before a certain date and had its tax levy invalidated, initiates another levy in accordance with general law, it may use the proceeds of the initial tax for those purposes authorized in the new levy, regardless of the effective date of the initial levy.

The bill creates a joint study committee on tourist-related taxes and requires that committee to review specific issues related to tourist taxes. The issues identified by the bill were recommended for review in an interim report by the Committee on Tourism, Hospitality and Economic Development. The joint study committee is required to report its findings, which may include recommended legislation, to the Legislature by January 1, 1993.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends paragraphs (a) and (b) of subsection (5), subsection (7), and subsection (9) of s. 125.0104, F.S. In paragraph (a) of subsection (5) the term "museum" is added to the list of authorized tax revenue uses along with the qualifier that the museums be publicly owned and operated or owned and operated by not-for-profit organizations and open to the public. In

paragraph (b) of subsection (5) the term "museums" is deleted from this subsection which designates certain uses for local option tourist development tax revenues in counties with a population under 500,000. In subsection (7) the term "museum" is added (with the qualifier that the museums be publicly owned and operated or owned and operated by not-for-profit organizations) to the list of facilities for which bonds were issued and provides for the automatic expiration of the county ordinance levying the tourist development tax upon the retirement of all bonds.

Subsection (9) is amended to authorize a county tourism promotion agency to undertake marketing and advertising research and provide certain reservation and booking services. It then provides an exemption from public records requirements for certain information given to or held by county tourism promotion agencies. A provision is made for the future review and repeal of this exemption.

Section 2 authorizes the governing body of any county which levied a tourist development tax pursuant to s. 125.0104, F.S., before January 1, 1991, and had that tax invalidated for failing to adhere to statutory requisites, to use the revenues of that tax under certain conditions. The county governing body may levy the tax again in accordance with the statutes and spend the tax revenues for those uses authorized by law, under the new levy.

Section 3 creates a joint interim study committee on tourist-related taxes. The committee is to be comprised of three members from the House of Representatives appointed by the Speaker of the House, and three

members of the Senate appointed by the President of the Senate. Per diem and travel expenses are authorized for the members pursuant to s. 112.061, F.S.

This section requires the committee to review and report on tourist tax issues by January 1, 1993, at which time the joint study committee will cease to exist.

Section 4 provides that this bill will be effective upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The approximate cost to the Legislature of 6 members traveling to Tallahassee for 3 joint committee meetings would be $5,400.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

Legislature	$5,400.00

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

The provisions of this bill allow authorized counties to substitute local option tourist development tax proceeds for funds the counties currently budget for museums.

2. Recurring Effects:

Same as above.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

Those counties utilizing the exemption from public records laws for information relating to proprietary research data could maintain their competitive edge by denying access to competing entities.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

This bill is exempt from consideration of the local mandates provisions.

A. APPLICABILITY OF THE MANDATES PROVISION:

None.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None.

V. COMMENTS:

Section 2 of this bill provides curative action for a class of county government which improperly levied a tax authorized by general law. Section 125.0104, F.S., authorizes any county in the state to levy a local option tourist development tax, if it meets certain prerequisites. As of January 1, 1991, 36 counties had enacted a local option tourist development tax pursuant to this section.

According to the Supreme Court in Givins v. Hillsborough County, 35 So. 89 (Fla. 1903), "The basis of the division into classes must be one founded in reason not an arbitrary selection of individuals; but where classification is well founded, and the legislation general in terms, the mere incident that but one of the class exists should not defeat the right of the Legislature to deal with the subject, nor tie its hands until a second individual shall be added to the class." The curative action addressed by the Legislature in this act currently captures one individual in the classification identified by the act. The possibility exists for a similar challenge to be raised in any one of the 35 other counties which levied tourist development taxes pursuant to s. 125.0104, F.S., prior to the date (January 1, 1991) established by this act for class distinction.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The CS includes the provisions of House Bill 147 and revises the issues included in House Bills 1551 and 1967 in the following manner:

House Bill 1551 authorized counties imposing the local option tourist development tax to use the revenues from that tax to fund emergency services within a high tourism impact county. The CS creates a joint study committee to study local needs (including emergency services) as they relate to the use of local option tourist development tax revenues.

House Bill 1967 allowed county governing boards to adopt tourist development plans for inclusion in ordinances levying local option tourist development taxes that were not developed by county tourist development councils and did not adhere to the provisions in paragraph (c) of subsection (4) of s. 125.0104, F.S. Under the original bill, an existing tax levied by an ordinance adopted by referendum vote would have been ratified and deemed to be in effect upon the initial filing with the Department of State or the approval of the electorate, whichever would have come first. The CS requires the county relevy the tax in accordance with the current provisions of the statutes in order to use the tax revenues collected under the invalidated tax levy.

In addition, the CS authorizes county tourism promotion agencies to conduct research and provide certain reservation and booking services, and provides an exemption from public records laws for certain information given to or held by county tourism promotion agencies relating to those activities.

VII. SIGNATURES:

COMMITTEE ON TOURISM, HOSPITALITY & ECONOMIC DEVELOPMENT:

Prepared by:	Staff Director:
Susan F. Holzer	Dee Hopkins Crusoe

COMMITTEE ON FINANCE & TAXATION:

Prepared by:	Staff Director:
Deborah G. Moerlins	José Diez-Arguelles

REVISED: MARCH 4, 1992 Bill No. SB
DATE: MARCH 2, 1992 Page

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

Analyst	Staff Director	Reference	Action
1. Cape	Cape	1. IT	FAV/1 Amend.
2.	Price	2. CA	Withdrawn
3. Sapolsky	Beggs	3. FT	Favorable
4.		4.	

Subject: Bill No. and Sponsor:

Local Option Tourist Development Tax — SB 2178 by Senator Dudley

I. Summary

A. Present Situation:

During the 1977 legislative session, the "Local Option Tourist Development Act" (Chapter 77-209) was adopted in order to provide counties with an option to raise additional revenues for tourist related projects or activities. Subject to a 1% or 2% tax are most rents, leases or lets, which have been contracted for periods of six months or less, or living accommodations in hotels, motels, apartment houses, rooming houses,

mobile home parks, and the like (i.e., all rental charges subject to the transient rental tax imposed in s. 212.03, F.S.). The tax rate is determined by the governing body of the county. The taxes are generally collected and administered by the Department of Revenue. The department returns proceeds, less costs of administration, to the county which imposed the tax. Counties may collect and administer the tax themselves if they adopt an ordinance in accordance with s. 125.0104(10), F.S. Currently, 37 counties levy this tax and 18 counties self-administer the tax.

Under s. 125.0104(4), F.S., the tourist development tax must be levied and imposed pursuant to an ordinance which contains the county tourist development plan prescribed under s. 125.0104(4)(c), enacted by the governing board of the county. Section 125.0104(4)(c), F.S., provides that prior to enactment of the ordinance which imposes the tax, the county tourist development council (required under paragraph (e) to be appointed by the governing board of the county) shall prepare a plan for tourist development which is submitted to the governing board of the county for its approval. The plan shall set forth the anticipated net tourist development tax revenue to be derived by the county for the 24 months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use. Paragraph (d) of s. 125.0104, F.S., provides that the governing board of the county shall adopt the county plan for tourist development as part of the ordinance levying the tax.

The ordinance must be approved by referendum pursuant to s. 125.0104(6), F.S.

The Second District Court of Appeal invalidated a tourist development tax imposed by Collier County and approved by referendum on September 4, 1990, because the county failed to comply with the statutory prerequisites of s. 125.0104, F.S. Freni, et al. v. Collier County, 588 So.2d 291 (Fla. 2d DCA 1991) (tourist development council did not submit a plan for tourist development to the county before the ordinance was adopted). A second lawsuit has recently been filed seeking refunds on behalf of a class of taxpayers. Griffith v. Carlton, No. 92-0419 (Fla. 20th Cir. comp. filed Feb. 5, 1992).

B. Effect of Proposed Changes:

The bill would authorize the governing body of a county under specified circumstances to use the proceeds from an invalidated tourist development tax for purposes authorized in a new levy.

Specifically, it would authorize the governing body of any county that levied a tourist development tax pursuant to section 125.0104, F.S., before January 1, 1991, which tax is invalidated for failure of a tourist development council to submit a requisite spending plan for tourist development to a governing body of the county for approval before the ordinance levying the tax was adopted, and that levies another such tax pursuant to s. 125.0104, F.S., which is approved by a majority vote of the electors of the county voting in a referendum before January 1, 1993, to use the

proceeds of the invalidated tax for the purposes that are authorized in the new levy.

The bill is intended to ratify the Collier County tourist development tax invalidated by the Second District Court of Appeal in the Freni case cited above.

II. Economic Impact And Fiscal Note:

A. Public:

None.

B. Government:

Any county meeting the requirements of the bill may use the amount of proceeds of an invalidated tourist development tax for the purposes authorized in a new levy. Collier County collected approximately $5 million in its invalidated levy.

III. Municipality/County Mandates Restrictions:

None.

IV. Comments:

It is within the prerogative of the courts to find that a bill introduced and treated by the Legislature as a general law is in reality a special law, thus invoking Article III, section 10, Florida Constitution, which requires special laws either to be pursuant to referendum approval or noticed pursuant to ch. 11, F.S. See Department of Business Regulation v. Classic Mile, Inc., 541 So.2d 1155 (Fla. 1989). The Constitution defines a special law as a special or local law. Article X, § 12(g), Florida Constitution. The Florida courts have defined a special law as a law

> relating to, or designed to operate upon, classified persons or things when classification is not permissible or the classification adopted is illegal; a local law is one relating to, or designed to operate only in, a specifically indicated part of the State, or one that purports to operate within classified territory when classification is not permissible or the classification is illegal.

Department of Business Regulation v. Classic Mile, Inc. (quoting State ex rel. Landis v. Harris, 120 Fla. 555, 562-63, 163 So.237, 240 (1934) (citations omitted).

In this context it must also be noted that Art. III, Sec. 11(a)(2), prohibits special laws pertaining to "assessment or collection of taxes for state or county purposes...." Further, Article VII, Section 1(a), Florida Constitution, provides that all forms of taxation, other than ad valorem, "shall be preempted to the state except as provided by general law." (Emphasis added). However, the courts do give wide discretion to the Legislature in establishing statutory classification schemes. Department of Business Regulation v. Classic Mile, Inc.

Curative legislation has been upheld by Florida courts to ratify a local government's actions after-the-fact. E.g., Middleton v. City of St. Augustine, 29 So. 421 (Fla. 1900); Givens v. Hillsborough County, 35 So. 88 (Fla. 1903); Orange County v. Webster, 546 So.2d 1033 (Fla. 1989).

House Bill 1967 (1992) amends section 125.0104(4)(d), F.S., by providing that if the tourist development council fails to submit a plan for tourist development pursuant to s. 125.0104(4)(c), then the county may adopt its own.

Section 2 of the House Bill then ratifies any ordinance proposing a tourist development tax that has been approved by the electorate after the tourist development council failed to submit a plan.

V. Amendments:

#1 by International Trade, Economic Development and Tourism: Requires, instead of authorizes, the governing body of the county, pursuant to the requirements of the committee substitute, to use the proceeds of an invalidated tourist development tax for the purposes that are authorized in a new levy. (WITH TITLE AMENDMENT)

Supreme Court, U.S.
FILED
JAN 30 1995
CLERK OF THE CLERK

(2) (3)

No. 94-1174 and No. 94-1177

In The

Supreme Court of the United States

October Term, 1994

RICHARD D. GRIFFITH, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

and

HOBART C. BISHOP, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

January 27, 1995

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Florida Second District Court of Appeal correctly determined that the Florida Legislature did not violate petitioners' due process rights when the Legislature ratified a tax that Collier County, Florida had levied and collected in a procedurally defective manner under state legislative taxing authority, where it is undisputed that the Legislature could have authorized the County to levy the tax in the manner it did in the first place and where the Legislature acted to ratify the tax after petitioners commenced suit seeking refunds but before petitioners prosecuted their refund claims to judgment.

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JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257 to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." As petitioners describe, the Florida Second District Court of Appeal disposed of petitioners' constitutional challenge to the validity of the legislation at issue in this case. Following that, the Florida Supreme Court declined to grant discretionary review of the Second District's decision. Accordingly, although petitioners Richard D. Griffith, et al., have styled their petition as a "Petition for Writ of Certiorari to the Florida Supreme Court," petitioners in fact seek review of the Second District's decision rejecting petitioners' constitutional challenge.

In its decision, the Second District reversed the trial court's order granting petitioners' motion for summary judgment on the issue of liability on the part of Collier County for the refund of the disputed taxes. The Second District remanded the case "for further proceedings consistent with" the Second District's opinion. (Appendix to Petition of Hobart C. Bishop, et al., A-5). Although the Second District's opinion contemplates that further proceedings will occur in the trial court, as a practical matter the Second District's determination that the Florida Legislature's action in ratifying the disputed taxes was constitutional disposes of petitioners' claim for refunds. Accordingly, entry of judgment for respondents in the trial court should amount to a ministerial act. In these circumstances, the Second District's determination of this cause may be deemed a "final judgment." E.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975); Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice, § 3.6, p. 100 (Bureau of National Affairs, 7th ed. 1993).

STATEMENT OF THE CASE AND FACTS

Petitioners ask this Court to grant a writ of certiorari to review the decision of the Florida Second District Court of Appeal reversing the trial court's summary judgment upholding petitioners' claims to the refund of taxes collected by respondent Collier County. The background of this dispute may be briefly stated.

In 1990, Collier County enacted Ordinance No. 90-43 providing for the collection of taxes from persons renting accommodations in the County. The County enacted Ordinance 90-43 pursuant to the Local Option Tourist Development Act (the "Tourist Development Act"), Section 125.0104, Fla. Stat. (1987). Before the County began collecting the tax, various hotel operators brought suit in the trial court to invalidate the tax on the ground that, in enacting Ordinance No. 90-43, the County had omitted a procedural step provided for in Section 125.0104(4) of the Tourist Development Act: namely, the County did not first obtain a plan for implementing the tax from an advisory body called the "tourist development council."

The hotel operators' suit called upon the court to construe the section of the Tourist Development Act captioned "Ordinance Levy Tax; Procedure." Section 125.0104(4), Fla. Stat. (1987) (emphasis added). This section prescribed certain procedures by which counties might implement the tourist development tax, including the use of a tourist development council. The statute directed that a County establish a tourist development council prior to levying a tax. The statute provided that the tourist development council was an "advisory" body. Section 125.0104(4)(e). (Appendix to Petition of Hobart C. Bishop, et al., A-31). The statute further specified that the tourist development council "shall prepare and submit to the governing board of the county for its approval a plan for tourist development." Section 125.0104(4)(c) (emphasis added). (Id., A-31).

Although Collier County established a tourist development council under the Tourist Development Act, the council declined to submit a plan to the County, taking it upon itself to protest the Tourist Development Act as "flawed." (R. 26). The Tourist

Development Act nowhere contemplated that the tourist development council might decline to discharge its responsibility to prepare a plan based on a disagreement with the enabling legislation; nor did the statute expressly address what might be done procedurally if that occurred.

Having consulted with its advisory council, the County Commission determined that it must deem the response it received as some sort of advisory proposal, which the County Commission had the prerogative to reject. Subsequently, the County enacted Ordinance No. 90-43, which was then approved by referendum.

The hotel operators contended in their challenge to the Ordinance that, although the tourist development council was an advisory body, the County could not levy a tax without somehow obtaining a plan for tourist development from that council. The trial court rejected the hotel operators' challenge. Having obtained the trial court's imprimatur of its Ordinance, the County proceeded to collect the taxes.

On appeal from the trial court's initial decision, the Second District reversed. See Freni v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991). The Second District held on that prior appeal that the submission of a plan by the tourist development council was a procedural prerequisite to the levy of the tax.

After the issuance of the Second District's first decision, the petitioner taxpayers brought suit for refunds of the taxes that had been collected under Ordinance No. 90-43 prior to that decision. These taxpayers were not parties to the hotel operators' suit that culminated in the Second District's earlier decision. In that earlier suit, the hotel operators had asserted no claim for refunds; nor had they sought any disposition of taxes collected under the disputed ordinance.

While the petitioner taxpayers' suit for refunds was pending, but before it had proceeded to judgment, the Legislature passed a curative law ratifying the previously imposed taxes that

had been collected without benefit of a plan by the tourist development council. See Section 125.0104, Fla. Stat. (1993) ("Curative Act"). In the trial court, petitioners thereupon challenged the Curative Act on the ground that it violated due process by operating retroactively to validate the subject taxes. Erroneously believing that the Second District's prior decision controlled the outcome of this constitutional challenge, the trial court ruled in the taxpayers' favor and granted the taxpayers' motion for summary judgment on the issue of the County's liability to pay the tax refunds.

The Second District reversed. The court held that "[a]lthough the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development." (Appendix to Petition of Hobart C. Bishop, et al., A-6).

Subsequently, petitioners sought review of the Second District's decision in the Florida Supreme Court. The Florida Supreme Court declined to review that decision.

SUMMARY OF ARGUMENT

In sustaining the validity of the curative legislation at issue here, the Second District adhered to well-settled precedent of this Court. Over the years, this Court has established guideposts on when and how the United States Congress or a state legislature may ratify taxes levied and collected in a procedurally improper manner, and the Second District faithfully followed those guideposts in this case. Further, although petitioners imply -- without arguing -- that the Second District's decision conflicts with decisions of the courts of other states, no such conflict exists. Accordingly, the petitions for a writ of certiorari should be denied.

ARGUMENT

Petitioners ask this Court to exercise its discretion to review the Second District's decision on the ground that it "is an affront to constitutional due process and stands as a dangerous precedent." (Petition of Hobart C. Bishop, et al., p. 4). Petitioners further exhort this Court to "confirm that its holdings" in prior decisions "continue to restrain legislatures from destroying vested claims for recovery of unauthorized taxes." (Ibid.; see also Petition of Richard D. Griffith, et al., p. 18).

There is nothing about petitioners' challenge or the Second District's decision that warrants plenary review by this Court. To the contrary, the decision in this case is quite pedestrian: It follows principles settled for almost a century by decisions of this Court.

1. In ruling in the County's favor, the Second District relied explicitly on this Court's decision in United States v. Heinszen, 206 U.S. 370 (1907). In Heinszen, the Court held that the legislature may ratify an unauthorized tax levy after it has been invalidated by the courts if the legislature would have had the power to authorize the levy in the first place in the manner in which the tax was imposed. Specifically, the Court stated that, when the legislature "possessed the power to have authorized [the]

imposition [of taxes] in the mode in which they were enforced," then "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Id. at 386.

The Court in Heinszen further held that, when the legislature exercises its prerogative to ratify a previously invalidated tax levy, this does not impermissibly impair any "vested" right of the taxpayer to prosecute a pending suit for refund to judgment. In this connection, in upholding the validity of a curative law ratifying taxes that this Court had previously invalidated, the Court in Heinszen held:

> Nor does the mere fact that, at the time the ratifying statute was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence, if it be conceded that the capacity to prosecute the pending suit to judgment was, in a sense, a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. Id. at 387 (emphasis added).

In its first decision, the Second District had faulted the County's original imposition of the tax solely because of the County's failure to follow the procedural step of first obtaining a plan from the tourist development council. Petitioners freely conceded in seeking review by the Florida Supreme Court that "[t]he Legislature's 1987 enabling legislation could well have dispensed with or limited the role of TDC's [tourist development councils]" in the imposition of the disputed taxes. (Bishop's Jur. Br., at 8)

This point is dispositive of petitioners' challenge. As Heinszen holds, and as the Second District recognized in its decision below, so long as the legislature could have authorized the

imposition of the tax in the first place in the manner imposed -- here, without benefit of a plan by the tourist development council -- then, "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Heinszen, 206 US at 386. That is exactly what occurred in this case. Nonetheless, petitioners attack the Second District's decision for two reasons.

First, petitioners imply that Heinszen has somehow lost its force, by the passage of time or otherwise. But petitioners conceded at oral argument before the Second District that Heinszen is still good law. And it is in fact recognized today as the leading case in the area of the constitutionality of curative legislation.[1/]

Second, petitioners contend that a different decision of this Court should control the outcome of this case, namely, Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 US 338 (1922). But it is Forbes and not Heinszen that is distinguishable from the case at bar.

It should be noted that this Court itself has admonished that Forbes must be carefully limited to its particular facts. The Forbes decision contained dictum purporting to restrict the application of the doctrine of ratification. The Court in Forbes, however, limited that language virtually as it was uttered, noting in the Forbes opinion itself that "[i]t is true that the doctrine of ratification has been carried somewhat beyond the point that we indicate." 258 U.S. at 339. Subsequently, in discussing Forbes, this Court

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[1/] See, e.g., Canisius College v. United States, 799 F. 2d 18, 26 (2d Cir. 1986), cert. denied, 481 US 1014 (1987); Hochman, C., The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 704 (1960) (noting that it is well recognized that curative laws "include[] those statutes which ratify prior official conduct of government officers who have acted without the requisite authority," and noting that "[t]he leading case in this area is United States v. Heinszen & Co.").

U.S. at 339. Subsequently, in discussing Forbes, this Court emphasized that "[t]he case concedes the power of ratification . . . and necessarily recognized the subjection and obligation of persons and property to government . . . [and] the recognition precludes a misunderstanding of the case and its extension beyond its facts." Charlotte Harbor & N. Ry. co. v. Welles, 260 US 8, 12 (1922) (emphasis added).

The facts of Forbes disclose that the government agency there levied tolls for the use of canal locks without the benefit of any express power to levy tolls whatsoever. As the Florida Supreme Court made clear in that case, "[a] careful examination of the acts of the Legislature [applicable to the Everglades district where the tolls were levied] [did] not reveal any express power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question." Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742, 82 So. 346, 351 (1919) (emphasis added). Thus, in the Second District, petitioners were relegated to arguing that, in Forbes, "the power to collect tolls was implied." (Answer Brief of Appellees Bishop, et al., p. 16 n. 12) (emphasis added). Here, by contrast, the County imposed its tax levy under the express statutory authority of the Tourist Development Act, albeit in a procedurally defective manner.[2/]

[2/] See also Graham v. Goodcell, 282 US 409, 427 (1931) ("defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated"). Petitioners erroneously contend that the Second District's decision is somehow at odds with Graham. To the contrary, Graham supports the Second District's decision by recognizing that the legislature can enact curative legislation to rectify; among other things, failures by government officials to comply with statutory requirements.

By the same token, petitioners mistakenly rely on other decisions of this Court upholding the validity of various types of

(continued...)

This is significant because this Court recognized in Forbes that a broad legislative prerogative exists to ratify unauthorized "acts done in the name of the Government by those who assume to represent it." 258 U.S. at 339. Indeed, this Court has specifically held that curative legislation may apply not only to defeat a claim for refund but to override even a final judgment granting a tax refund where, as here, the taxing authority collected the taxes under the ostensible authority of a general law, even though the taxing authority was mistaken in its belief that the requisite authority existed. Rafferty v. Smith, Bell & Co., 257 U.S. 226 (1921). As this Court has explained, "a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation." Hodges v. Snyder, 261 U.S. 600, 604 (1923). Petitioners have conceded in this case that Collier County's tax was enacted under the "ostensible legislative authority [of] Florida Statutes § 125.0104." (R. 458).

In addition, not only was there no enabling legislation in Forbes for the levy of any taxes, but the legislation that did exist affirmatively assured the public that no toll would be charged. Thus, the Court in Forbes emphasized that "[i]t would seem from the first decision of the Court below that the transaction [taxed] was not one for which payment naturally could have been expected." 258 U.S. at 340. The "first decision of the Court below," which invalidated the tolls prior to enactment of the curative law, pointed out that the legislation establishing the Everglades drainage district assured the public that it was "entitled

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[2/](...continued)
pp. 8-11). Petitioners do not cite a single decision by this Court other than Forbes that struck down such legislation. At best, petitioners are reduced to distinguishing these other decisions. Petitioners do not and cannot distinguish this Court's decision in Heinszen, however, from this case. And Heinszen is controlling.

to the free use of such waterways." Forbes, 82 So. 346, 351 (Fla. 1919) (emphasis added).

Here, by contrast, far from assuring renters that no charge would be exacted for the privilege of renting accommodations in this state, the Tourist Development Act made plain that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977) (emphasis added). Indeed, prior to the time that petitioners paid the tax, the trial court had issued its initial decision upholding the tax.

Finally, petitioners concede that curative laws may be applied constitutionally to rectify a failure on the part of the taxing authority to follow statutorily required procedures. This Court in Forbes likewise acknowledged that curative laws may be applied to defeat taxpayer claims when the invalidity of the earlier agency action stems from a "technical defect" in the administration of a law, as distinguished from the omission of enabling legislation. 258 U.S. at 339. Here, the Second District invalidated the County's ordinance originally because the County enacted it in a procedurally improper manner. In fact, in the trial court, petitioners conceded that "a careful reading of the Amended Complaint . . . shows that Plaintiffs do not dispute or challenge the general authority of Defendants to enact a tourist development tax under Fla. Stat. § 125.0104, but rather challenge and dispute the defective procedures employed by Defendants in enacting a particular tourist development tax . . . ." (R. 520, 535). As the Second District correctly recognized, then, it is Heinszen and not Forbes that controls the outcome of this case.

Thus, the Second District's decision comports with long-established authority and well-accepted principles. Petitioners' admonitions about the far-reaching ramifications of the Second District's decision is merely the familiar argument of a party disappointed over the outcome of an appeal.

2. In the same vein, petitioners Hobart C. Bishop, et al., contend that this Court must intercede in this case because "the Board of Commissioners . . . deliberately and knowingly ignored the limits of its authority." (Petition of Hobart C. Bishop, et al., p. 10). Petitioners insist that a legislature may act to ratify prior tax levies only to cure "unintended defects" or "inadvertent" mistakes by agencies charged with the job of carrying out a tax. (Id. at 8-9). This argument is flawed for at least two reasons.

First, petitioners mischaracterize the County's actions. By the time the County collected the disputed taxes from petitioners, the trial court had denied the hotel operators' request to enjoin the referendum on the County's original Ordinance, the Second District had affirmed the decision denying the injunction, the Ordinance was in effect, and the trial court had entered its final order upholding the Ordinance. This confirms, at a minimum, that the County's authority to levy the tax in the first instance was colorable.

When the Second District reversed the trial court's initial decision, the County ceased levying the taxes and escrowed the moneys already collected. This is hardly a case, then, where the Florida Legislature has acted to ratify the actions of "rogue" tax collectors run amuck -- as petitioners contend. (Id. at 10).

More fundamentally, it can always be said -- in hindsight -- that a taxing authority acted in the face of procedural limitations on its authority, or in the absence of authority, in levying a tax that has been subsequently invalidated by the courts. Likewise, it can always be said that the tax collectors had reason to know that they were doing so, inasmuch as the taxpayers suspected it and the courts ultimately confirmed it. Yet, the courts have time and time again upheld the power of the legislature to ratify previously unauthorized or procedurally defective tax levies for the express purpose of cutting off taxpayer suits for refund.

For example, in Graham v. Goodcell, 282 U.S. 409 (1931), this Court ratified the collection of taxes by the Internal

Revenue Service after the statute of limitations had run on those taxes. The IRS collected those taxes based on a Treasury regulation that provided that the statute of limitations did not apply to collection of taxes by distraint proceedings, the common method of enforcing payment. Thus, the IRS did not allow the statute to run through inadvertence, but based on a deliberate judgment that the IRS could nonetheless collect the taxes due.

Ultimately, this Court in Graham repudiated the IRS's interpretation of its enabling legislation, and, predictably, taxpayers commenced claims for refunds based on this Court's decision. Against that background, Congress enacted legislation ratifying the IRS's collection of the disputed taxes. In sustaining that legislation, this Court acknowledged that "it was the purpose of the Congress that payments made in the circumstances described . . . should not be refunded." 282 U.S. at 418.

Likewise, in sustaining the legislation ratifying the collection of the disputed taxes in Heinszen, this Court recognized that the President had imposed those taxes by fiat, without authority, and this Court in three separate cases had conclusively held that the President was "without power . . . in the absence of express authority from Congress, to impose the tariff duties in question" and that the "imposition of the duties . . . was unlawful." 206 U.S. at 380 (emphasis added). Still, this Court upheld Congress' authority to ratify those taxes and thus to cut off pending suits for refund of the taxes.

Thus, petitioners' submission that the Second District in this case misapplied applicable law to uphold some kind of abuse of authority by either the County or the Florida Legislature is meritless.

3. In a final effort to demonstrate that this Court should grant the writ to review the Second District's decision in this case, petitioners Bishop, et al., imply – but do not directly argue – that the Second District's decision conflicts with decisions of other state courts. (Petition of Hobart C. Bishop, et al., pp. 12-14).

Petitioners Griffith, et. al, make no attempt to assert that such a conflict exists.

In this connection, petitioners Bishop, et al., point out that this Court dismissed an appeal (for want of a substantial federal question) from the state court decision in State ex rel. Emmerik v. Janklow, 304 N.W. 2d 700 (1981), in which the South Dakota Supreme Court rejected a constitutional challenge to state legislation that ratified taxes collected twelve years earlier. Plainly, the Second District's decision in this case does not conflict with either the ruling of the South Dakota Supreme Court upholding such legislation or with the decision of this Court in Emmerik dismissing an appeal from the state court's decision for want of a substantial federal question. If anything, this Court's decision in Emmerik further demonstrates that the Second District's decision in this case accords with governing law.

Petitioners insist, however, that, in dissent in Emmerik, Justice White suggested that the decision in Emmerik was in "apparent" conflict with a decision of the Maryland Court of Appeals in Washington National Arena Limited Partnership v. Treasurer, 287 Md. 38, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980). As we have shown, the Second District's decision in this case does not conflict with Emmerik. Nor does it conflict with Washington National.

In Washington National, a county was given legislative authority in 1968 to impose a recordation tax at a rate of $1.10. In the face of that authority, the county imposed a tax at a rate of $1.65. Eight years later, in 1976, the state legislature enacted a statute purporting to authorize the county's collection of the higher tax. The court in Washington National held that the case was more like this Court's decision in Forbes than Heinszen because, in both Forbes and Washington National, the taxing authorities had acted to impose a tax in the face of affirmative assurances by the state legislature as to "what, if anything, should be charged by the government." 410 A. 2d at 1067.

Specifically, the court in Washington National emphasized that this Court in Forbes had "pointed out that, in light of the decision of the Florida court below interpreting the Commissioner's statutory authority, the 'transaction was not one for which payment naturally could have been expected.'" Ibid., quoting Forbes, 258 U.S. at 340. As we have discussed, the legislation at issue in Forbes affirmatively assured the public that use of the waterways would be free.

Likewise, in Washington National, the court pointed out that the county had acted to collect the higher tax in the face of legislation expressly assuring the public that the tax would be less. Because the discrepancy related to the critical issue of the amount of the tax, the court in Washington National held that the legislature could not renege on the assurance that it had previously given on this issue.

As we have discussed, in this case, in contrast to Forbes and Washington National, at the time petitioners rented accommodations the Tourist Development Act gave no assurances that petitioners would not be taxed or that they would be taxed at some favorable rate. To the contrary, in enacting the Tourist Development Act the Florida Legislature made plain all along that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977).

Further, the court in Washington National hastened to acknowledge that where, as here, the taxing authority has failed to comply with a procedural or technical requirement of the enabling statute, the legislature can constitutionally ratify the defective tax levy after the fact. 410 A. 2d at 1067. It is precisely that authority that the Second District sustained in holding, "Although the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist

development." (Appendix to Petition of Hobart C. Bishop, et al., A-6) (emphasis added).

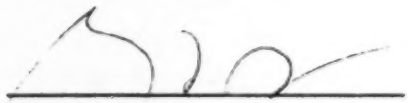
Accordingly, the Second District's decision is consistent with all the cases upon which petitioners rely.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

January 27, 1995

Respectfully submitted,



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